Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

MICHAEL RICHARDS
Petitioner,

v.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY,
Respondents.

On Petition For Writ of Certiorari
To The Texas 10th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the Texas A&M University and University of Texas systems but do not waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act, which protect employees from retaliation for filing a workers' compensation claim and are applicable to all other public and private employees covered by the Act. Do sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution by eviscerating the legislatively announced public policy behind the Workers' Compensation Act of providing all Texas state employees with prompt remuneration for their work-related injuries by leaving employees of the Texas A&M University and University of Texas systems unprotected from retaliation for filing a workers' compensation claim and thereby effectively denying them the protections of the Act, while protecting all other similarly situated Texas state employees?

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The opinion of the trial court has not been selected for publication and is reproduced as Appendix B, at A-33. The opinion of the Texas Tenth Court of Appeals has been selected for publication and is reproduced as Appendix E, at A-58. The Texas Tenth Court of Appeals' order denying Richards' motion for rehearing is unreported and is reproduced as Appendix G, at A-93 . The Texas Supreme Court's letter ruling denying review is reproduced as Appendix I, at A-121.

JURISDICTION

The opinion of the Texas Tenth Court of Appeals was issued on February 11, 2004. The Texas Supreme Court denied a timely petition for review on June 25, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition for Writ of Certiorari involves a challenge to sections 502.002 and 503.002 of the Texas Labor Code based on the Equal Protection Clause of the United States Constitution. Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the Texas A&M University and University of Texas systems but fail to waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act as to these employees. TEX. LABOR CODE §§ 502.002, 503.002 (Vernon 1996). Because sections 502.002 and 503.002 deny employees of the Texas A&M University and University of Texas systems

the protection from retaliation for filing a workers' compensation claim granted to all other public and private employees covered by the Act, sections 502.002 and 503.002 violate the Equal Protection Clause of the United States Constitution, which provides, "No state shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. The Proceedings Below

On August 25, 1998, Michael Richards filed suit against the Texas A&M University System and Texas A&M University (collectively, "Texas A&M") alleging that Texas A&M violated the anti-retaliation provisions of the Texas Workers' Compensation Act by firing him for filing a workers' compensation claim. Texas A&M moved to dismiss Richards' suit based on sovereign immunity. In his Supplementary Brief to the trial court, Richards argued that sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution, because they do not waive sovereign immunity against retaliation claims filed by employees of the Texas A&M University and University of Texas systems ("A&M and UT systems"), despite the fact that such sovereign immunity has been waived for all other public employees. Appendix A, at A-1 to A-5. Nonetheless, the trial court dismissed Richards' suit without naming any legitimate state purpose to justify section 502.002's and 503.002's discrimination. Appendix B, at A-33. In fact, the trial court acknowledged that: "There is no logical basis for the distinction." Appendix B, at A-35. Richards urged the trial

court to recon-sider its ruling based on his Equal Protection argument, but to no avail. Appendix C, at A-37. Richards noticed his appeal on May 30, 2001.

In the Texas Tenth Court of Appeals, Richards again challenged sections 502.002 and 503.002 based on the Equal Protection Clause. Appendix D, at A-49. The Court of Appeals affirmed the trial court's dismissal of the case on February 11, 2004, finding that the Texas legislature endorsed the discrimination in sections 502.002 and 503.002 for a single legitimate state purpose-to protect the public treasury. Appendix E, at A-70 to A-71. Richards moved for reconsideration of this decision citing the Equal Protection Clause, but his motion was denied. Appendix F, at A-83; Appendix G, at A-93.

Richards ultimately petitioned the Texas Supreme Court for review and once again asserted that the Equal Protection Clause invalidates section 502.002's and 503.002's discriminatory scheme. Appendix H, at A-103. The Texas Supreme Court denied review on June 25, 2004. Appendix I, at A-121. Richards has diligently preserved his Constitutional challenge to sections 502.002 and 503.002, which is squarely before this Court in this timely filed Petition for Writ of Certiorari.

II. Material Facts

Richards had been employed as a maintenance worker for Texas A&M University since 1992. During his employment, he received numerous glowing performance evaluations and congratulatory letters. In early 1998, he suffered an on-the-job back injury and filed a claim with the

Texas Workers' Compensation Commission under the Texas Workers' Compensation Act. Shortly after Richards filed this claim, Texas A&M retaliated by firing him. Texas A&M then reported Richards' back injury to his prospective employers, which frustrated his ability to seek new employment.

REASONS FOR GRANTING THE WRIT

I. Sections 502.002 and 503.002 of the Texas Labor Code Violate the Equal Protection Clause of the United States Constitution By Discriminating Against Employees of the Texas A&M and University of Texas Systems Without a Legitimate State Purpose.

It is fundamental that the Equal Protection Clause is meant to prevent arbitrary distinctions in the law. *See e.g. Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Avery v. Midland County*, 390 U.S. 474, 484 (1968). When a state statute distinguishes between individuals based on non-suspect classifications, that statute is unconstitutional unless the discrimination is rationally related to a legitimate state purpose. *Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001). Sections 502.002 and 503.002 of the Texas Labor Code make the general protections of the Texas Workers' Compensation Act applicable to employees of the A&M and UT systems but fail to waive the state's sovereign immunity from suit under the anti-retaliation provisions of the Act, which protect employees from retaliation for filing a workers' compensation claim and are applicable to all other public and private employees covered by the Act. Protecting the state treasury has been advanced by the Texas Tenth Court of Appeals as the state purpose that justifies this dis-

crimination against Texas A&M and UT system employees. Protecting the public treasury, however, is not a legitimate state purpose, as it violates the legislatively announced public policy of the Workers' Compensation Act–ensuring that employees receive prompt remuneration for their injuries. Because there is no legitimate state purpose behind denying Texas A&M and UT system employees the protection from retaliation afforded all other public and private employees covered by the Workers' Compensation Act, sections 502.002 and 502.003 violate the Equal Protection Clause of the United States Constitution.

A. Sections 502.002 and 503.002 discriminate against employees of the A&M and UT systems by failing to adopt the anti-retaliation provisions of the Act and waive the state's sovereign immunity from retaliation claims, thereby making A&M and UT system employees the only employees covered by the Texas Workers' Compensation Act that do not enjoy the protections of the Act's anti-retaliation provisions.

As noted above, the overarching purpose of the Texas Workers' Compensation Act is to provide employees with prompt remuneration for work-related injuries. *Paradissis v. Royal Indemnity Co.*, 507 S.W.2d 526, 529 (Tex. 1974). In fact, the Act usually provides an injured employee with his exclusive remedy for work-related injuries. *Walls Reg'l Hosp. v. Bomar*, 9 S.W.3d 805, 806 (Tex. 1999) (citing TEX. LAB. CODE § 408.001(a)). The Texas legislature recognized that employers could escape workers' compensation liability and thwart the legislature's purpose by harshly retaliating against employees who file workers' compensation claims so

that employees would be discouraged from pursuing their exclusive remedy at all. *See Trico Technologies, Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997). To protect employees' exclusive remedy under the Workers' Compensation Act, the legislature enacted the Act's anti-retaliation provisions. *See id.* These provisions create a cause of action for an employee when his employer retaliates against him for filing a workers' compensation claim or participating in such a claim in other specified ways. *Id.* (citing TEX. LAB. CODE § 451.001). Both the Texas legislature and courts have acknowledged that unless employees are protected from retaliation, employers acting in bad faith could bring the workers' compensation system to its knees–a right unprotected is no right at all.

While nearly all private and public employees in Texas enjoy the protection of the Texas Workers' Compensation Act's anti-retaliation provisions, employees of the A&M and UT systems do not. By their plain language, the anti-retaliation provisions apply to all private employees covered by the Act, and the Texas legislature has adopted the anti-retaliation provisions and waived the state's sovereign immunity from retaliation claims filed by most public employees. *See* TEX. LAB. CODE §§ 451.001, 451.002, 501.002(a)(10), 504.002(a)(7), and 505.002(a)(10). The legislature, however, has not adopted the anti-retaliation provisions and waived the state's sovereign immunity from suit for employees of the A&M and UT systems. TEX. LAB. CODE §§ 502.002, 503.002. Thus, sections 502.002 and 503.002 discriminate against employees of the A&M and UT systems by treating them differently than all other private and public employees.

B. There is no legitimate state purpose for section 502.002's and 503.002's discrimination against employees of the A&M and UT systems.

Faced with section 502.002' s and 503.002's undeniable discrimination against employees of the A&M and UT systems and Richards' argument that sections 502.002 and 502.002 violate the Equal Protection Clause, Respondents were forced to articulate a legitimate state purpose for denying employees of the A&M and UT systems the protection of the anti-retaliation provisions. Respondents never asserted or articulated a state purpose, however, and the Texas Tenth Court of Appeals finally explained that the legislature's decision to deny employees of the A&M and UT systems the protection of the anti-retaliation provisions of the Workers' Compensation Act was to protect the public treasury.

Not all state purposes, however, are legitimate. Limits on state purposes are critical because the very purpose of the Equal Protection Clause is to protect individuals from arbitrary distinctions in the law. *Olech*, 528 U.S. at 564; *Avery*, 390 U.S. at 484. If courts were blind to the capriciousness of certain legislative purposes, the Equal Protection clause would be empty. Accordingly, despite its inclination to defer to state legislatures, this Court has expressly recognized some boundaries beyond which a state legislature's purpose is no longer legitimate. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). For example, a state purpose is not legitimate if it violates a constitutional provision or conflicts with federal law. *Id.* These limits are necessary to prevent state legislatures from creating arbitrary distinctions in the law. *See id.* Likewise, a state legislature's purpose must be illegitimate when that purpose

violates the state's legislatively announced public policy. If a state legislature had unbridled authority to single out groups of individuals and violate its own public policy as to only those individuals, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law.

The only reason the Texas Tenth Court of appeals articulated to justify the Texas legislature's decision to deny employees of the A&M and UT systems coverage under the anti-retaliation provisions of the Workers' Compensation Act-to save the state money-violates Texas' public policy of ensuring that employees receive prompt remuneration for their injuries. Without protection against retaliation, injured employees of the A&M and UT systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation claim. These employees' legitimate fear of retaliation will create a *chilling effect*, as injured workers of these two state university systems, which number in the thousands, realize that their exclusive remedy under the Workers' Compensation Act is practically worthless. Fewer and fewer injured workers at these two state university systems will choose to jeopardize their jobs by seeking the prompt remuneration that is promised exclusively by the Act. Because the Texas legislature's apparent money-saving decision to deny A&M and UT system employees protection from retaliation for filing workers' compensation claims singles out these employees and effectively strips them of their right to prompt remuneration for their work-related injuries, it violates Texas' public policy and cannot be legitimate.

Recognizing that protecting the state treasury is not a legitimate state purpose in light of Texas' public policy of

ensuring that employees receive prompt remuneration for their injuries, the Texas Tenth Court of Appeals tried to come up with an additional rational basis for section 502.002's and 503.002's discrimination against employees of the A&M and UT systems. The Texas Tenth Court of Appeals pointed to the fact that the A&M and UT systems are the only state educational systems that are authorized to meet their workers' compensation obligations by self-insurance and explained that "the distinction between insured and self-insuring entities can constitute a valid rational basis for a distinction between them." Appendix E, at A-70. The Texas Tenth Court of Appeals' reasoning is flawed for at least two reasons.[1]

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[1]The Texas Tenth Court of Appeals also pointed to *Clark v. University of Texas Health Science Center*, 919 S.W.2d 185, 188 (Tex. App.–Eastland 1996, writ den'd), in support of its holding that sections 502.002 and 503.002 do not violate the equal protection clause. In *Clark*, another Texas appellate court considered the constitutionality of section 503.002. The plaintiff, a UT system employee, filed a retaliation action against the University of Texas after she was fired for filing a workers' compensation claim. *Id.* at 188. The trial court granted the university's motion for summary judgment on sovereign immunity grounds, and the plaintiff appealed. *Id.* Rejecting the plaintiff's argument that section 503.002 violated the Equal Protection Clause, the court reasoned that the plaintiff did not have a property interest in her employment and that the plaintiff had not identified any express agreement or statute protecting her from being discharged without a hearing. *Id.* at 188. The existence of a property right and availability of a hearing are inquiries relevant to a due process analysis, not an equal protection analysis. Nowhere in the opinion does the *Clark* court address whether section 503.002's disparate treatment of UT system employees is justified by a legitimate state purpose. Because the *Clark* court mistakenly conducted a due process analysis when evaluating whether section 503.002 violated the Equal Protection Clause, the Texas Tenth Court of Appeals erred in relying on *Clark* to support its holding.

First, the A&M and UT systems may be the only state educational systems that are authorized to meet their workers' compensation obligations by self-insurance, but they are not the only state entities that are allowed to self-insure. Indeed, all the state's political subdivisions, including the state's counties, municipalities, special districts, school districts, junior college districts, housing authorities, and community centers for mental health and mental retardation services, are authorized to meet their workers' compensation obligations by self-insurance. TEX. LAB. CODE §§ 504.001(3), 504.011. Despite the fact that the state's political subdivisions are allowed to self-insure, the Texas legislature granted the employees of the state's political subdivisions the protection of the anti-retaliation provisions of the Worker's Compensation Act. *See id.* § 504.002. Thus, the fact that the A&M and UT systems are allowed to self-insure cannot explain the disparate treatment of A&M and UT system employees.

Second, even if the A&M and UT systems were the only state entities allowed to meet their workers' compensation obligations by self-insurance, the distinction between insured and self-insured entities is illusory. While an insured entity may not directly pay judgments rendered against it, that entity will eventually pay the cost of the judgment through increased insurance premiums. At the end of the day, an insured entity is not likely to save more money than a self-insured entity, making this a distinction without a difference.

In sum, almost all private and public employees in Texas enjoy protection against retaliation for filing a workers' compensation claim. Employees of the A&M and UT systems are denied this protection because the Texas legisla-

ture declined to adopt the anti-retaliation provisions and waive the state's sovereign immunity from retaliation claims filed by employees when enacting sections 502.002 and 503.002 of the Texas Labor Code, which make the Texas Workers' Compensation Act generally applicable to employees of the A&M and UT systems. Apparently, in an effort to simply save the state money, the legislature left these employees defenseless against retaliation for filing a workers' compensation claim, effectively stripping them of their right to prompt remuneration for their work-related injuries. Because, in doing so, the legislature violated the public policy announced in the Workers' Compensation Act of providing prompt remuneration to injured workers, saving the state money cannot be a legitimate state purpose. Unsupported by any legitimate state purpose, sections 502.002 and 503.002 violate the Equal Protection Clause of the United States Constitution.

II. This Court Must More Clearly Recognize a Meaningful Limit on What Constitutes a Legitimate State Purpose.

This Court has clearly held that the Equal Protection Clause imposes limits on legitimate state purposes, but the precise contours of these limits are uncertain. This Court should clearly recognize that a state purpose is illegitimate when it violates a state's legislatively announced public policy. Without a clear limit on legitimate state purposes, state legislatures are left to speculate about how they may legitimately exercise their authority, and this legislative guessing game will lead to results that this Court cannot accept.

Here, for example, the Texas legislature's decision to deny employees of the A&M and UT systems protection

from retaliation for filing a workers' compensation claim has created a chilling effect that discourages these select employees from filing workers' compensation claims and violates the state's public policy of ensuring that employees receive prompt remuneration for their work-related injuries. This chilling effect is made even more intolerable by the fact that it has a disproportionate effect on racial minorities. Racial minorities make up a disproportionately large number of the less educated labor pool that feeds jobs requiring manual labor, and, therefore, will more frequently suffer job-related injuries. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, 383, 385, 406, 408 (122nd ed. 2002) (discussing minorities in manual labor and the higher injury rates related to manual labor jobs); *see also* Anne C. Case & Angus Deaton, Broken Down by Work and Sex: How Our Health Declines (July 2003) (on file with the National Bureau of Economic Research at http://papers.nber.org/papers/W9821). Because racial minorities suffer more job-related injuries, they are more likely to need the protections of the Workers' Compensation Act, and they will be disproportionately affected by any restriction of those protections.

Moreover, without a meaningful limit on what constitutes a legitimate state purpose, the Texas legislature, and other state legislatures across the country, could choose to save money in any number of other unacceptable ways. For example, the Texas legislature could choose to except the A&M and UT system employees, or any other group of state employees, from coverage under the Texas Whistleblower Act, which protects government employees from retaliation for making a Whistleblower report. TEX. GOV'T CODE § 554.001, *et seq*. Then, if an employee of the A&M or UT

systems reported illegal activity, the A&M or UT system could retaliate by firing the employee and escape any consequences. Sovereign immunity would bar this employee's suit despite the Whistleblower Act's legislatively announced public policy of preventing such retaliation against all other state employees. Again, the Texas legislature's public policy of encouraging Whistleblower reports would be thwarted, because employees of the A&M and UT systems would be hesitant to make a Whistleblower report and some reports would not be made at all. Despite the legislatively announced public policy of Texas, the A&M and UT systems would arbitrarily be left vulnerable to governmental corruption. Such a result would be no less alarming than the result of the Texas legislature's action in the case at bar. A&M and UT system employees, especially minority employees, are left vulnerable and injured with no protection against workplace retaliation.

If this Court stands idly by, what other arbitrary violations of legislatively announced public policy must the Court tolerate? Today, the Court has an opportunity to give substance to the Equal Protection Clause.

CONCLUSION

This Petition for Writ of Certiorari should be granted to ensure that state legislatures are adequately appraised of the reach of the Equal Protection Clause of the United States Constitution. Richards respectfully requests that this Court reverse the Texas Tenth Court of Appeals' panel decision. Specifically, Richards requests that this Court find that Sections 502.002 and 503.002 of the Texas Labor Code violate the Equal Protection Clause of the United States Constitution because they fail to provide protection against retaliation for filing a workers' compensation claim to employees of the A&M and UT systems, a protection granted all other private and public employees covered by the Texas Workers' Compensation Act. Richards further asks that sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX VOLUME I

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Appendix A

Supplementary Brief to Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Jurisdiction.....A-1

Appendix B

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APPENDIX A

CAUSE NO. 47,822-361 Filed Mar 2, 2001

MICHAEL RICHARDS, Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§	361ST JUDICIAL DISTRICT

SUPPLEMENTARY BRIEF TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Michael Richards (hereinafter referred to as "Plaintiff"), Plaintiff in the above referenced case, and files this, his Supplementary Brief to Plaintiff's Response to Defendants' Motion to Dismiss for Lack of Jurisdiction. In support hereof, Plaintiff respectfully would show the following to the Court:

I.
SUMMARY OF ARGUMENT

Texas A & M University, a member institution of The

Texas A & M University System, and The Texas A & M University System (collectively "TAMUS") are state agencies and do not enjoy sovereign immunity protection for acts of retaliation under Chapter 501 of the Texas Labor Code. Defendants would deprive TAMUS employees of a protection afforded to most other state employees. If Chapter 502 does not waive sovereign immunity as to TAMUS, then it is unconstitutional in that it violates the equal protection of law provisions of the U.S. Constitution and Texas Constitution by depriving the Plaintiff of a protected property interest whereas other similarly situated employees cannot be deprived of the same interest. In addition, if Chapter 502 does not waive sovereign immunity to TAMUS, it is unconstitutional as it applies to state employees because it effectively abrogates their right to bring an anti-retaliation cause of action, in violation of the "open courts" provision of the Texas Constitution. Further, any other legislative remedy is foreclosed which results in the Plaintiff having to rely on this Court for affirmative relief.

II.
ARGUMENTS AND AUTHORITIES

The Texas Supreme Court, in *Fernandez v. Kerrville State Hospital*, 28 S.W.3d 1 (Tex. 2000), held that sovereign immunity for state agencies has been waived under the 1989 version of Chapter 451 of the Texas Labor Code, the State's Anti-Retaliation Law. Courts addressing the issue of sovereign immunity have consistently held that a branch of university system is a state agency. *Carrillo v. Texas Tech University Health Sciences Center*, 960 S.W.2d 870 (Tex.App.-El Paso 1997); *Honhorst v. University of North Texas*, 983 S.W.2d 872 (Tex.App.-Fort Worth, 1998);

Southwest Texas State University v. Enriquez, 971 S.W.2d 684 (Tex.App.-Austin, 1998). Chapter 501 of the Labor Code defines a state agency to be an institution. It is therefore axiomatic that the Legislature could not have intended that Chapter 502 of the Labor Code be used to deprive employees of TAMUS (or the UT System under Chapter 503 of the Labor Code) of a right enjoyed by all other state and private employees, including, for instance, and without limitation, employees of Texas Tech University, University of North Texas, and Southwest Texas State University. It can only make sense, and be appropriately fair and equal, that the Legislature intended that all state agencies, including TAMUS and its member institutions, waive sovereign immunity for acts of retaliation, or conversely stated, it cannot have been the intent of the Legislature to protect one group of state employees from retaliation and not another group of employees, who are similarly situated.

III.
EQUAL PROTECTION

Otherwise, assuming the Legislature intended to waive sovereign immunity for state employees, except those at TAMUS, then Chapter 502, along with Chapter 501.024(8)[1] of the Texas Labor Code is un constitutional in that it violates the equal protection of the law provisions of the Fourteenth Amendment to the U.S. Constitution and Texas Constitution Article I § 3. The Legislature has the power to waive sovereign immunity or not to waive sovereign immunity for agencies of the State. *Clark v. University*

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[1]Section 501.024(8) expressly excludes TAMUS employees from the provisions of Chapter 501.

of Texas Health Science Center at Houston, 919 S.W.2d 185 (Tex.App.-Eastland, 1996, writ denied). In *Clark*, the Eastland Court of Appeals held that because the University of Texas System employee could not identify any express agreement or statute which protected her from being discharged without a hearing, they could not engage in an equal protection analysis. *See Id.* at 188. Here the *Clark* holding is easily distinguished and thus inapplicable to this case for the reason that the Plaintiff herein was afforded protection from arbitrary discharge. Under TAMUS Policies an employee can only be discharged for adequate cause. TAMUS Policy 32.02.02 ¶¶ 2,3. (Exhibit "A") Thus, the Plaintiff had a property interest in his employment and, unlike *Clark*, an equal protection analysis must be made.

The Fourteenth Amendment to the United States Constitution provides that"[n]o State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. Similarly, the Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. ART I § 3. Under a rational basis equal protection test, similarly situated individuals must be treated equally under statutory classification unless there is "some legitimate articulated state purpose" for not doing so. *McGinnis v. Royster*, 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, (1973). Thus, the standard by which equal protection claims are reviewed is whether establishment of disparate treatment for different classes is rationally related to goals the legislature sought to achieve by enacting the legislation, *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985).

Depriving TAMUS employees from the general waiver of sovereign immunity embodied in Chapter 501 of the Texas Labor Code denies them the equal protection of the laws as required by the Fourteenth Amendment to the United States Constitution and by article I, § 3 of the Texas Constitution. Chapter 502 (and 501.024(8)), which retains sovereign immunity for TAMUS, clearly ereates different classes of state employees that are treated differently under the law. By waiving sovereign immunity for most state employees to be able to complain about retaliation for filing workers compensation claims, the Legislature is constitutionally required to waive sovereign immunity as to TAMUS employees, or be in violation of the equal protection provisions referenced herein above.

IV.
OPEN COURTS PROVISION

In addition, the Texas Constitution provides that "all courts shall be open, and every person for injury done to him, in his lands, goods, person or reputation shall have remedy by due course of law." TEX. CONST. ART. 1, § 13. While the "open courts" provision does not restrict the Legislature's freedom to substantively modify or abrogate purely statutory causes of action, the Legislature may not unreasonably impede a party's access to court to assert a cause of action it has created. *See Central Appraisal District of Rockwall County v. Lall*, 924 S.W.2d 686 (Tex. 1995). When considering whether the Legislature has unreasonably impeded access to courts in violation of the open courts provision, it does not matter whether the claim which is being impeded arises through statute or common law. ld. The Defendants' assertion that sovereign immunity under Chapter 502 denies

access to the courts to TAMUS employees violates the open courts provision.

Sovereign immunity is a common law doctrine in that it preceded the current Texas Constitution. *Green International, Inc. v. State*, 877 S.W.2d 428 (Tex.App.-Austin, 1994). The open courts provision must be read in light of the pre-existing concept of sovereign immunity. *Id.* In *Green*, the Austin Third Court of Appeals found no authority holding that the open courts provision was intended to abolish or limit sovereign immunity, *Id.* The Appellant in Green was asking the court to waive sovereign immunity in an instance not contemplated by the Legislature. The Green case can be distinguished from the ease at bar in that the Plaintiffis not asking this Court to waive sovereign immunity where the Legislature has not already specifically intended waiver. This waiver has already been recognized by the Texas Supreme Court in *Fernandez*. The Plaintiff asks only to be afforded the same access to the courts enjoyed by all other state agency employees and thus, avail himself of his right to the open courts of this State.

V.

LEGISLATIVE REMEDY IS FORECLOSED

Concerning Mr. Richards' potential remedy in seeking a Legislative Waiver of Sovereign Immunity against the Defendants, the undersigned sent the attached letters (Exhibits "B" and "C") to State Senator Steve Ogden and State Representative Fred Brown, respectively. Senator Ogden's Senior Staff Aide, Kevin Heybum, communicated that Senator Ogden declined to introduce such legislation on behalf of the Plaintiff, and Representative Brown's office has not returned a follow up call placed to them. On my initial inquiry to Representative Brown's office, Melissa Nicholas,

Mr. Brown's aide, related that Mr. Brown most likely would not introduce such legislation and unless I received a call back from their office I should assume that Representative Brown would not introduce such legislation. By late afternoon on Friday, March 2, 2001, no calls were received from Representative Brown, and no intervention by him is expected based on the representation made by his staff aide. The Plaintiff believes that the Defendants represent such a large part of the support base for both Senator Ogden and Representative Brown that sponsoring such legislatio n would likely pose a risk to such support and result in their reluctance to file claims to waive sovereign immunity for an individual situated as is the Plaintiff. In fact, neither Senator Ogden nor Representative Brown have agreed to sponsor such an individualized legislative remedy, and as a result the Plaintiff has only to rely on this Court for any relief.

WHEREFORE PREMISES CONSIDERED, Plaintiff, Michael Richards, prays that this Court deny Defendants' Motion to Dismiss for Lack of Jurisdiction, and for all such other relief to which he may be justly entitled.

Respectfully submitted,
WEST, WEBB, ALLBRITTON,
GENTRY & RIFE, P.C.
By: /s/ Gaines West
Gaines West
State Bar No. 24028727
C. Scott Settle
STATE BAR NO. 24028727
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - Telephone
(979) 694-8000 - Facsimile

ATTORNEY FOR PLAINTIFF,
MICHAEL RICHARDS

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been delivered by facsimile and regular first class mail to counsel listed below on this 2nd day of March, 2001.

Shannon L. Simmons
Assistant Attorney General
Tort Litigation Division
P.O. Box 12548
Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

SYSTEM REGULATIONS

32.02.02 Discipline and Dismissal Procedure for Nonfaculty Employees

November 4, 1997

Revised September 18, 2000

Supplements System Policy 32. 02

1. GENERAL

1.1 Basic Principles

1.1.1 This System regulation is based on the principle of progressive discipline. A System employee whose conduct or job performance is not consistent with accepted standards, and whose conduct or job performance does not warrant dismissal as discussed later in this regulation, will be notified that the conduct or job performance is inappropriate or unacceptable and be given a reasonable time to correct those deficiencies. With progressive discipline, an employee faces increasingly stricter disciplinary measures if satisfactory improvement does not occur after the disciplinary process is initiated.

1.1.2 This process applies to nonfaculty employees of the System, including agency employees wi,th faculty titles who are not in tenure track positions. This

process does not apply to graduate assistants, probationary (see Regulation 33.99.02), temporary or wage employees. These employees may be dismissed at any time for any reason. A wage employee is an employee who is hired on a temporary basis for less than four and one-half months during a fiscal year and/or at less than 50 percent effort. Student workers are also wage employees if student status is a condition of employment. Wage employees do not occupy a line item in the budget and are paid biweekly on the wages payroll. Wage employees are not eligible for employee benefits, including retirement group insurance, paid vacation, paid sick leave and paid holidays. However, if a regular employee is transferred to wages to train his/her replacement, he/she may maintain his/her benefits.

1.1.3 The System specifically retains the right to dismiss an employee without any requirement to pursue progressive disciplinary procedures when it is determined that the employee's conduct or job performance warrants immediate dismissal: In addition, not every step must be taken in each case. The supervisor and department head will agree on the appropriate steps based on each situation.EXHIBIT A

1.1.4 This regulation is for guidance purposes only and is specifically not intended to create any right to notice and opportunity for a hearing beyond that mandated by state and federal laws. Failure to follow procedures as outlined in this regulation will not create claims based on failure to meet standards of procedural due process beyond those mandated by state and

federal laws. No claifias asserting procedural due process rights exceeding those mandated by state and federal law will be subject to mediation. Failure by the System or a System component to follow the procedural steps outlined in this regulation will not form the basis of any employee's appeal of termination.

1.1.5 The discipline and dismissal process includes procedural steps that may need to be modified to provide a fair and workable process for employees stationed away from the System component's headquarters. The Chief Executive Officer (CEO) of each System component is authorized to modify these procedures when required by the organizational structure or the geographical dispers!on of employees of the component. These modified procedures must conform m pnnclple with the procedures outlined in this regulation and be documented by a component rule.

1.2 Heads of departments or similar administrative units are responsible for their employees being informed of the rules and regulations to be followed, the standards of conduct to be met, and the job performance to be achieved. Employees are expected to fully acquaint themselves With the rules, procedures, and standards of conduct and performance of their departments or units Employees who do not assume the responsibilities set out by these rules, procedures, and standards may be subject to disciplinary actions.

2. GROUNDS FOR DISCIPLINARY ACTION OR DISMISSAL

2.1 Nonfaculty employees of the System are subject to dis-

ciplinary action or dismissal under the procedures outlinbd herein if adequate cause is established.

2.2 Acts that may result in disciplinary action or dismissal include, but are not limited to" incompetence; inability to perform assigned duties in a satisfactory manner; misconduct; acts of dishonesty; moral turpitude; inappropriate usage or possession of firearms or any other prohibited weapons (as defined by See. 46.05 of the Texas Penal Code) on System property Without proper authority; threats of violence; neglect of assigned responsibilities; insubordination; absenteeism; inability to work with others where required; lack of sufficient skill necessary to complete job assignments; failure to abide by the rules and regulations of the System and its components; sexual harassment; refusal to cooperate or interference with an interna! investigation; failure to abide by state and federal statutes while on the job; commission, on or offthe job, of any illegal act under state and federal laws that could affect job performance; endangerment of the safety ofcoworkers; or similar behavior.

2.3 These acts can he either specifically enumerated acts (see 2.2) or general acts not enumerated herein that nevertheless are manifestations of professional irresponsibility, a lack of trustworthiness, a breach of trust, or a lack of personal or professional credibility with supervisors, coworkers, or others that seriously undermine or prohibit the employee's ability to function effectively in higher job.

3. BURDEN OF PROOF

3.1 The burden of proof is ion the employ!ng institution or agency to show adequate cause why the individual should

be disciplined or dismissed. It is the responsibility of the head of the department or similar administrative unit, or designee, to document the facts and inform the employee of the inappropriate job-related conduct or unacceptable job performance.

3.2 The employee will be given the opportunity to respond to the notice that the job-related conduct or job performance was inappropriate.

3.3 Copies of all documents pertaining to disciplinary action or dismissal will be filed in the official personnel file maintained for each employee by the System component. Access to such documents will be based on the provisions of the Texas Public Information Act. (See System Regulation 61.01.02.)

3.4 A System component CEO can require approval from a higher level than the departmental or unit approval levels required by this regulation.

4. PERSONAL CONFERENCES

4.1 When reason arises to question the job-related conduct or job performance of an employee, the appropriate supervisor will discuss the matter with the individual in a personal conference.

4.2 A written record ofth_ personal conference will be prepared and signed by the supervisor, and a copy will be given to the employee. An acknowledgment of receipt will be signed by the employee, and a copy of the written record and the signed acknowledgment will be placed in the employee's personnel file. If the employee refuses to

sign the record, a third party may be called in and asked to sign the record, witnessing that the employee has refused to sign. Alternatively, the record may be totaled to the address of record of the employee by certified mail or with a certificate of mailing, and the return receipt or certificate filed along with the written record. This record will state the performance or conduct problems discussed in the conference, the timing and nature of corrective measures to be taken by the employee, and any related agreements reached by the supervisor and employee.

4.3 On occasion, personal conferences may be conducted without preparing a written record for the employee's personnel files, since an informal notice may result in the desired changes in behavior. If the employee continues to have problems meeting conduct and/or job performance standards, the supervisor may prepare a written reprimand that references the past informal conferences.

4.4 If the undesirable conduct or performance continues after the personal conference(s), the supervisor will initiate further disciplinary action or dismissal procedures.

4.5 A conference held for an annual performance evaluation and the accompanying Written report of the evaluation may be considered part of the discipline and dismissal procedure.

5. WRITTEN REPRIMAND

5.1 When the supervisor determines that an employee has failed to respond to personal conference(s) or has committed an infraction of sufficient severity to warrant more severe disciplinary action, a written reprimand may be prepared and forwarded to the head of the department or

similar administrative unit (or next higher manager), or designee, fo approval. Upon approval by the head of the department or unit, the reprimand will be issued to the employee.

5.2 To achieve its intended purpose of resolving issues of job-related conduct or job performance of employees, the written reprimand will, as a minimum:

(1) state explicitly the inappropriate job-related conduct or unacceptable job performance of the Employee;

(2) describe any preVious efforts through personal conferences to make the employee aware of the need for a change in conduct or job performance pertinent to the situation or event;

(3) state precisely what corrective measures are expected, and within what time frame, if appropriate; and

(4) specify the adverse personnel actions the employee may expect to be taken.

5.3 Depending on the severity of the inappropriate job-related conduct or unacceptable job performance, the written reprimand may be the appropriate disciplinary action in circumstances including, but not limited to:

(1) continued inefficient, inaccurate, or unsafe work practices after personal conference(s);

(2) continued neglect of assigned duties or workplace rules or procedures after personal conference(s);

(3) damage or loss of System property;

(4) abuse of sick leave or other leaves of absence;

(5) insubordination; or

(6) other inappropriate job-related conduct or job performance that interferes with fulfilling job performance standards or the job performance of other personnel.

5.4 As part of the written reprimand, the employee may be placed on probation. If the employee fails to take the specified corrective measures within the specified probationary period, the employee may be terminated. The employee should be informed in writing that he or she is on probation and will be supervised more closely during that period.

6. TEMPORARY SUSPENSION WITHOUT PAY

6.1 An employee may be suspended without pay as a disciplinary measure for those causes that require more severe action than a written reprimand but are not considered sufficiently serious to warrant dismissal of the employee. Such suspension may also be appropriate if the action of the employee would normally be cause for termination, but mitigating circumstances are present which indicate that it is highly unlikely the employee would repeat the behavior.

6.2 Heads of departments and similar administrative units are authorized, upon receiving the written approval of the applicable vice president or equivalent administrator, or designee, to suspend an employee without pay for up to five working days. If the employee is exempt under the Fair Labor Standards Act, the suspension must be for a full workweek (Monday through Friday) and may not include any partial workweeks. A partial week suspension for an exempt employee will be allowed only for an infraction of a major safety rule. In situations involving employee fraud, theft or dishonesty, an exempt or nonexempt employee may be'suspended without pay for more than five working days with the approval of the CEO of the System component. The head of the department or similar administrative unit, or designee, will notify the employee in writing of the suspension without pay, the reason for the suspension and the beginning and ending dates of the suspension. The employee will be given an opportunity to respond orally when notified and/or within 24 hours in writing, and the suspension will not begin until the employee's response, if an),, has been received and considered.

6.3 An employee who is suspended without pay will be treated the same as an employee on an authorized leave without pay with respect to vacation and sick leave accrual, group insurance coverage, and other employee benefit programs during the suspension period. (See System Regulation 31.03.04.) If the employee does not return to work at the end of the suspension period or notify the supervisor of an inability to return on the specified date, the employee will be deemed to have terminated employment on that date.

6.4 If it is subsequently determined that the employee was suspended without adequate cause or that the terms of the suspension were too severe in proportion to the severity of the offense, the employee may receive back pay for all or part of the suspension period or a lesser form of discipline may be imposed if warranted. Payment for any back pay will be made through supplemental payroll procedures, and the suspension period will be reclassified as suspension With pay. Any sick leave or vacation lost or not accrued due to the leave without pay will be reinstated

6.5 Depending on the severity of the problem, temporary suspension without pay may be the appropriate disciplinary action in circumstances including, but not limited to:

(1) repetition of actions for which written reprimand(s) had been previously issued;

(2) insubordination;

(3) use of alcoholic beverages or illegal drugs or abuse of legal drugs on duty, or reporting for duty under the influence of same; or

(4) other job-related conduct or job performance that interferes with fulfilling job performance standards or the job performance of Other personnel.

6.6 An exempt or nonexempt employee who is alleged to have been involved in on-the-job violent conduct is deemed to be in violation of workplace safety rules and may be immediately suspended without pay by the employee's immediate supervisor for the purpose of

reviewing the facts with the head of the department or similar administrative unit, or designee, and determining the action to be taken. The suspension may be for the remainder of the work day during which the alleged conduct occurred and may include also the work day following the day of the occurrence. The employee must be given written notice and be allowed to respond as described in paragraph 6.2, but the suspension may begin before the written notice is prepared or the employee's response is received. The written notice should be given to the employee upon his or her return to work and 24 hours should be allowed for the employee's response.

6.7 Temporary suspension Without pay is designed to give supervisors greater flexibility in resolving problems with job-related conduct or job performance, but it is not an employee right nor a required step in the disciplinary process. The supervisor is not obligated to use suspension without pay as a form of discipline. The failure to use suspension without pay before terminating an employee is not a basis for an employee appeal of termination.

7. EXTENDED SUSPENSION WITH PAY

7.1 An employee may be suspended with pay by a System component CEO or designee for up to 30 working days because of alleged aetions that may be grounds for dismissal. Any delegation of authority under this section must be established in writing by the CEO. Extended suspension with pay will not be used as a disciplinary action. Its purpose is to allow time for completion of an investigation of the allegation and for administrative review by the head of the department or similar administrative unit, or designee. Additional time for the invrstigation beyond 30 days may

be granted only by the CEO.

7.2 Examples of alleged employee actions for which extended suspension with pay may be appropriate include, but are not limited to, allegations of suspected or reported:

(1) fraud or thet_ that may be job-related;

(2) physical assault against fellow employees, students, Clients, or visitors during working hours or on System premises;

(3) use of alcoholic beverages or illegal drugs or abuse of legal drugs while on duty, or reporting for duty under the influence of same;

(4) intentional damage or misuse of System property; or

(5) job-related violation of a criminal statute.

7.3 The head of the department or similar administrative unit, or designee, will notify the employee in writing of the suspension with pay, when the suspension will begin and the reason for the suspension. The component will notify the employee in writing of the end of the suspension or other action based on the results of the investigation. If the employee does not return to work at the end of the suspension period or notify the supervisor of an inability to return on the specified date, the employee will be deemed to have terminated employment on that date.

7.4 After the investigation, an appropriate form of

discipline may be imposed if warranted.

8. TRANSFER, DEMOTION AND/OR SALARY REDUCTION FOR DISCII_LINARY REASONS

8.1 Upon recommendation of the head of the department or similar administrative unit, or designee, the System component CEO, or designee, may transfer, demote and/or reduce the salary of an employee for disciplinary reasons because of work performance or job-related conduct that does not meet established standards.

8.2 Demotion means a change in duty assignment to a position ofiower rank. Such reduction in rank will normally be accompanied by a decrease in salary rate. Transfer means a reassignment and/or change in duty assignment to a position of similar rank.

8.3 Reduction in salary may accompany a demotion or may be implemented without a change in title or duty assignment.

8.4 The head of the department or similar administrative unit, or designee, will notify the employee in writing of the transfer, demotion and/or reduction in pay, the reasons for this action and the effective date of the action. The employee will be allowed to respond orally and/or in writing within 24 hours of receiving the notice to the person who issued the notification. The action will not become effective until the employee's response, if any, has been received and considered.

9. DISMISSAL

9.1 Heads of departments or similar administrative units

are authorized to initiate an action to dismiss an employ,ee and to set the effective date.

9.2 Dismissal action may be taken immediately atter approval by the appointing authority or designee. The employee must be notified of the dismissal, in writing. The prescribed personnel action form confirming the d smissal must be processed through administrative channels.

9.3 Generally, a minimum of two weeks' notice should be given to an employee. However, no advance notice need be given for dismissals resulting from on-the-job conduct including, but not limited to, dishonesty, insubordination, or violent or disruptive conduct, nor is advance notice required for wage employees. The employee will be given the opportunity to respond orally and/or in writing within 24 hours of receiving the notice. The dismissal will not become effective until the employee's response, if any, has been received and considered.

9.4 After a notice of termination is given; the employee must work, take accumulated leave, use earned compensatory leave or be suspended with pay through the termination date in order to be paid. Suspension with pay must be approved by the CEO or designee. Severance pay for time not worked or earned will not be authorized. A supervisor may allow the employee reasonable paid time off during this period to apply and interview for other employment.

9.5 If it is subsequently determined that the dismissal was made without adequate cause, the employee may be reinstated in the same position held at the time of dismissal and may be paid back pay to the date of the dismissal. A lesser

form of discipline may be imposed if warranted. If the employee is reinstated, benefits accruing to the employee, such as vacation and sick leave, will be reinstated to the date of dismissal.

10. RESTITUTION

The employee being disciplined oi- dismissed may be required to make restitution for damages to property or equipment, for theft, for unauthorized purchases or payment of wages, for unauthorized travel expenses, or for other illegal or improper actions. If restitution is not made under the terms and conditions mandated, the employee may be subject to legal action and/or further discipline or dismissal.

11. APPEAL OF DISCIPLINARY ACTION OR DISMISSAL

If an employee wishes to appeal any disciplinary action or dismissal from employment, the appeal must be made in accordance with the provisions of System Regulation 32.01.02.

****

CONTACT OFFICE: The System Human Resources Office

HISTORY: Last issued: November 4, 1997

SYSTEM COMPONENT RULES PERTAINING TO THIS SUBJECT:

System Administrative and General Offices:

* SAGO

Academic Institutions:

- BCD
- PVAMU
- TSU
- TAMIU
- TAMU: 32.02.02.M1 Discipline and Dismissal Procedures for Employees Other Than Faculty
- TAMU-C
- TAMUCC
- TAMU-K
- TAMU-T
- WTAMU

Agencies:

- TAES: 32.02.02.A1 Discipline and Dismissal
- TAEX
- TADCS
- TFS
- TVMDL
- TEES
- TEEX
- TTI

WEST, WEBB, ALLBRITTON, GENTRY & RIFE
A PROFESSIONAL CORPORATION

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TEXAS BOARD OF
SPECIALIZATION

February 28, 2001

Honorable Steve Ogden
Texas State Senator
P. O. Box 12068
Austin, Texas 78711

Via Fax No. (512) 463-5713
and Regular Mail

RE: Mr. Michael Richards

Dear Senator Ogden:

My client, Michael Richards, was employed by

Texas A&M University for nearly thirteen (13) years until he was terminated for filing a workers' compensation claim for injuries he received on the job. I filed a lawsuit on his behalf and it is currently pending in Judge Steve Smith's 361st Judicial District Court as Cause No. 47-822. Recently, Texas A&M University, represented by the Attorney General of Texas, filed a request that my client's lawsuit be dismissed for want of jurisdiction-claiming that the State's sovereign immunity prevents the court from considering his claim. Texas A&M is alleging that Chapter 502 of the Labor Code, which contains our State's statutes dealing with A&M's workers' compensation provisions, exempts the Texas A&M University System from having to comply with the State's Anti-Retaliation Statute contained in Chapter 451 of the Labor Code.

Texas A&M's motion is currently pending before Judge Smith and he is set to rule on that motion, and review our briefs on the issue, as early as next week. Since the Bill filing deadline for this Session of the Legislature is March 9, 2001, 1 respectfully request on behalf of my client that you sponsor legislation that would allow Mr. Richards to sue the Texas A&M University System in the event my client's legal remedies are eliminated.

I have had the pleasure of working with Keyin Heybum of your office over the iast several days concerning this issue. Mr. Heybum is fully apprised of the issues in this case and of the reality that the State' s position in my client' s case effects 25,000 Texas A&M University System employees statewide. In fact, their position effects 10,000 employees in Brazes County alone. The State's position also would effect the University of Texas System which involves

Chapter 503 of the Labor Code. I have related to Mr. Heyburn that our position is that it is unconscionable to conclude that the Legislature ever intended that the Texas A&M University System and the University of Texas System could freely retaliate against its employees for filing workers' compensation claims for injuries they receive on the job. In fact this is not the law for private employers or any other state employer, including all other institutions of higher education in Texas. As incredible as this all sounds, it is the position taken by the Attorney General that Texas A&M may fire an employee for filing a workers' compensation claim and not be able to be held responsible for their retaliation.

I understand that you have an interest in looking into this issue further, however, my client needs legislation to be introduced immediately before the Bill filing deadline so that his ease can go forward in the event that his judicial remedies are eliminated. Judge Smith has announced in open court that he believes that my client has the option of pursuing legislation to waive sovereign immunity, and he apparently considers it as a viable remedy. If you would consider filing this legislation, against the Texas A&M University System, to waive the State's sovereign immunity in Mr. Richards' case, please provide me a letter indicating your intent immediately and we will work with your staff to prepare legislation to support my client's claim.

However, if you are incfined to not allow my clien't to pursue such legislation I need to have a letter from you so that I might show it to Judge Smith to demonstrate that even this avenue of relief is foreclosed for my client.

Thank you for your immediate attention to this

matter. KBTX and the Eagle are planning stories on Mr. Richards' plight.

Sincerely,

/s/ Gaines West
GAINES WEST

WEST, WEBB, ALLBRITTON, GENTRY & RIFE
A PROFESSIONAL CORPORATION

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TEXAS BOARD OF
SPECIALIZATION

February 28, 2001

Honorable Fred Brown
Texas State Representative
P. O. Box 2910
Austin, Texas 78768-2910

Via Fax No. (512) 463-5109
and Regular Mail

RE: Mr. Michael Richards

Dear Representative Brown:

My client, Michael Richards, was employed by

Texas A&M University for nearly thirteen (13) years until he was terminated for filing a workers' compensation claim for injuries he received on the job. I filed a lawsuit on his behalf and it is currently pending in Judge Steve Smith's 361st Judicial District Court as Cause No. 47-822. Recently, Texas A&M University, represented by the Attorney General of Texas, filed a request that my client's lawsuit be dismissed for want of jurisdiction-claiming that the State's sovereign immunity prevents the court from considering his claim. Texas A&M is alleging that Chapter 502 of the Labor Code, which contains our State's statutes dealing with A&M's workers' compensation provisions, exempts the Texas A&M University System from having to comply with the State's Anti-Retaliation Statute contained in Chapter 451 of the Labor Code.

Texas A&M's motion is currently pending before Judge Smith and he is set to rule on that motion, and review our briefs on the issue, as early as next week. Since the Bill filing deadline for this Session of the Legislature is March 9, 2001, 1 respectfully request on behalf of my client that you sponsor legislation that would allow Mr. Richards to sue the Texas A&M University System in the event my client's legal remedies are eliminated.

I have had the pleasure of working with Keyin Heybum of your office over the iast several days concerning this issue. Mr. Heybum is fully apprised of the issues in this case and of the reality that the State' s position in my client' s case effects 25,000 Texas A&M University System employees statewide. In fact, their position effects 10,000 employees in Brazes County alone. The State's position also would effect the University of Texas System which involves

Chapter 503 of the Labor Code. I have related to Mr. Heyburn that our position is that it is unconscionable to conclude that the Legislature ever intended that the Texas A&M University System and the University of Texas System could freely retaliate against its employees for filing workers' compensation claims for injuries they receive on the job. In fact this is not the law for private employers or any other state employer, including all other institutions of higher education in Texas. As incredible as this all sounds, it is the position taken by the Attorney General that Texas A&M may fire an employee for filing a workers' compensation claim and not be able to be held responsible for their retaliation.

I hope that you will look into this issue further. Senator Ogden has said he would not introduce legislature to help my client but would consider the larger issue of changing the law. I appreciate his concern but it won't help my client. i need legislation introduced in this Session seeking a waiver of the State's sovereign immunity foor retaliation against Mr. Richards. Will you help him?

Judge Smith has announced in open court that he believes that my client has thhe option of pursuing legislation to waive sovereign immunity, and he apparently considers it as a viable remedy. If you would consider filing this legislation, against the Texas A&M University System, to waive the State's sovereign immunity in Mr. Richards' case, please provide me a letter indicating your intent immediately and we will work with your staff to prepare legislation to support my client's claim.

However, if you are inclined to not allow my clien't to pursue such legislation I need to have a letter from you so

that I might show it to Judge Smith to demonstrate that even this avenue of relief is foreclosed for my client.

Thank you for your immediate attention to this matter. Should you have any questions about this matter, please call me at once. KBTX and the Eagle are planning stories on Mr. Richards' plight.

Sincerely,

/s/ Gaines West
GAINES WEST

APPENDIX B

CAUSE NO. 47,822-361		Filed May 2, 2001
MICHAEL RICHARDS, Plaintiff,	§ § §	IN THE DISTRICT COURT OF
V.	§ § §	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§ § § § § §	361ST JUDICIAL DISTRICT

MEMORANNDUM RULING ON DEFENDANTS' MOTION TO DISMISS FOR WANT OF JURISDICTION

Michael Richards has filed suit against the Texas A&M University System ("System") and Texas A&M University ("TAMU") alleging that he was in retaliation for filing a worker's compensation claim. The Defendants dismissal of the suit, claiming that the suit is barred under the doctrine reign immunity.

The Texas Supreme Court has consistently held that sovereign bars suits against governmental entities unless there is a clear and explicit constitutional or statutory waiver of immunity. *Federal Sign v. Texas Southern Univ.*, 951

S.W.2d 401 (Tex. 1997), Only when sovereign immunity has been cleady and waived by the Legislature will Texas courts recognize the waiver. *City of LaPorte v. Barfield*, 898 S.W. 2d 288 (Tex. 1995).

The Texas Labor Code In §451,001 makes discharging or discrimination against a person who has filed a compensation claim actionable. Private sector employees have enjoyed this provision under our workers compensation laws for many years, The Labor Code provides worker's compensation coverage for state employees in the following statutes:

Section 501 - state employees, including employees of the Texas Tech System

Section 502 - employees of the Texas A&M System

Section 503 - employees of the University of Texas System

Section 504 - employees of political subdivlslons

Section 505 - employees of the Texas Department of Transportation

Sections 501.002, 504.002 and 505.002, respectively, each provide that the provisions of Section 451 apply to each governmental entity. Sections 502.002 and 503.002 (the corresponding sections regarding the A&M and IJT systems) omit Section 451 from application.

In *Fernandez v. Kerrville State Hospital*, 2000 WL 890203, the Texas Supreme Court held that sovereign immunity for those State Agencies covered under Chapter 501 of the Labor Code had been waived. In reaching its decision, the Court looked to the express language of the 1989 codification of the Anti-Retaliation Act in reaching its conclusion,

Plaintiff argues that the state has waived its immunity with respect to the System and TAMU because they are state employees and the failure of §451 coverage for them amounts to a denial of equal protection under the 14th Amendment to the U.S. Constitution and Article I, §3 of the Texas Constitution.

As to Plaintiffs first argument, §501.024 of the Labor Code expressly excludes from coverage as a "state employee" those persons employed by the A&M System who are covered by Chapter 502. There is no evidence that Plaintiff is not a person covered by Chapter 502, so Plaintiff's first argument cannot be sustained.

The Equal Protection argument is more compelling. This Court cannot comprehend why the Legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas tech system) while denying that same coverage to those employees of the A&M and UT systems, There is no logical basis for the distinction, However, logic is not the controlling factor in deciding constitutional issues.

Although decided prior to the Fernandez case cited above, the case of *Clark v. University of Texas Health Science Center*, 919 S.W.2d 185 (11th Dist. - 1996) is directly on point. In *Clark*, an employee of the UT system filed suit alleging retaliatory discharge for the filing of a worker's compensation claim. In deciding that the Ut system enjoyed sovereign immunity, the Eastland Court of Appeals held:

> "The legislature has the power to waive sovereign immunity or not to waive sovereign immunity for

agencies of the State. Even though the legislature has waived immunity for suits under Section 461.001 for some state employees and not for others, this does not violate the equal protection of law provisions of the U.S. CONST., amend. XIV or TEXAS CONST., art. I, §3."

While this court does have the authority to declare statutes to be in violation of federal or state constitutional provisions, it declines to do so In light of a direct appellate decision which, for the time, stands as stare decisis in our law. It remains to the legislature to provide the explanation to employees of the A&M and UT systems as to why they do not enjoy the same protections of our worker's compensation laws that other state employees do.

The Motion to Dismiss for Want of Jurisdiction is GRANTED,

Signed this 2nd day of May, 2001.

/s/ Steve Smith
STEVE SMITH
Presiding Judge

APPENDIX C

CAUSE NO. 47,822-361		Filed May 3, 2001
MICHAEL RICHARDS, Plaintiff,	§	IN THE DISTRICT COURT OF
V.	§	BRAZOS COUNTY, TEXAS
TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY, Defendants.	§	361ST JUDICIAL DISTRICT

MOTION FOR RECONSIDERATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Michael Richards (hereinafter referred to as "Plaintiff"), Plaintiff in the above ease, and files this, his Motion for Reconsideration of the Court's May 2, 2001 Order and in support, would show the following:

This Court in its order stated that there is no "logical basis" for the disparity in treatment between employees of Texas A&M and UT Systems and all other state employees. While termed as "no logical basis for the distinction," this Court clearly recognizes that there is no rational basis for the disparity. That is precisely the test for whether a statute is violative of the Equal Protection Clause -- that no rational basis exists for the disparity. *E.g., McGinnis v. Royster*, 410

U.S. 263,270, 93 S.Ct. 1055, 1059 (1973). The United States Supreme Court recently reaffirmed this well-established standard:

> Such a classification cannot ran afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.

Board of Trustees of Univ. of Ala, v. Garrett, ___U.S..___, 121 S.Ct. 955,964 (2001)(citing and quoting *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326 (1992); *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513 (1976) (*per curiam*)).

Furthermore and significantly, the State of Texas never proffered any basis and Plaintiff negated any conceivable rational basis for the disparity.[1] The record is now complete. Therefore, as a matter of law, the statute should be declared unconstitutional. The Clark case,[2] cited by the Court and relied upon heavily by the State, did not adequately or accurately address Equal Protection. Simply put, the Eastland Court of Appeals missed the boat. Beyond that Court's conchisory language that the statute does not violate equal protection of laws provisions of the state and federal

---

[1] This Court agreed with Plaintiffin stating, "There is no logical basis for the distinction." Order of May 2, 2001 at 3.

[2] *Clark v. Univ. of Texas Health Science Center at Houston*, 919 S.W.2d 185 (Tex.App.--Eastland 1996, writ denied).

Constitutions, the Court wholly failed to conduct an equal protection analysis or even discuss arty issues germane to an equal protection analysis. Nowhere does the *Clark* Court discuss or even address what the standard is for whether a statute violates Equal Protection, nor did the Court address or state what rational basis existed for the disparate treatment. Instead the Court only discussed issues which relate to whether an individual has a protected property interest, appropriate for due process analysis, but not equal protection. Plaintiff would respectfully remind the Court that United States Supreme Court authority clearly and easily trumps that of the Eastland Court of Appeals, especially in matters of United States Constitutional import and *stare decisis* regarding the same.

The issue here is whether the statute treats similarly situated individuals differently under the law and, if so, whether the state has a rational basis for doing so. *E.g., Garrett*, 121 S.Ct. at 964.

The Court has decided the former issue and the State of Texas has failed to make any showing regarding the second. Thus, the Court should find that the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

WHEREFORE PREMISES CONSIDERED, Plaintiff, Michael Richards, prays that this Court reconsider its May 2, 2001 Order and strike down the provisions of the Texas Labor Code which violate the Equal Protection Clause of the United States Constitution.

Respectfully submitted,
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This is to certify that the above and foregoing document has been delivered by facsimile and regular first class mail to counsel listed below on this 2nd day of March, 2001.

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/s/ Gaines West
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APPENDIX D

NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS,
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY,
APPELLEES

Appealed from the 361st District Court
Brazos County, Texas
Cause No. 47,822-361

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NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS,
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM AND TEXAS A&M UNIVERSITY,
APPELLEES

Appealed from the 361st District Court
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STATEMENT OF THE CASE

On August 25, 1998, Appellant Michael Richards ("Richards") filed suit against Defendants Texas A&M University System and Texas A&M University (hereinafter referred to collectively as "A&M') alleging that his termination from employment with A&M was in retaliation for his filing a Texas Worker's Compensation claim. (I C.R. at 2-5).

In September of 2000, following the Texas Supreme Court decision in Kerrville State Hosp. v. Fernandez, 28 S.W.3d 1 (Tex. 2000), which held that the legislature had waived sovereign immunity for the purposes of Chapter 451 (the Anti-Retaliation Law) of the Worker's Compensation law, A&M filed a Motion to Dismiss for Want of Jurisdiction, based on the fact that Chapter 502 of the Labor Code, which governs worker's compensation coverage for A&M, omits Chapter 451 from the list of provisions applicable to A&M. A&M argued that because Chapter 451 was not included in the provisions of worker's compensation laws applicable to A&M, there could be no anti-retaliation suit brought against A&M and therefore the Court had no jurisdiction to hear such a case. (I C.R. at 32-39).

On May 3, 2001, the Court granted A&M's Motion to Dismiss for Want of Jurisdiction, agreeing that, because the chapter goveming worker's compensation coverage for A&M employees, unlike the chapters governing coverage for other state employees, did not include Chapter 451 in the list of applicable provisions, A&M employees have no cause of action ifA&M retaliates against them for filing a worker's compensation claim. (II C.R. at 248-251). The Court disagreed with Richards that the law violated his right to Equal

Protection under the Texas and United States Constitutions. (II C.R. at 250).

Richards noticed his appeal on May 30, 2001. (II C.R. at 263).

ISSUE PRESENTED

There is but a single issue on appeal: Whether Chapter 502 of the Texas Labor Code violates the Equal Protection Provisions of the United States and Texas Constitutions because it denies A&M employees the protection of the Anti-Retaliation Law (Chapter 451) whereas all other similarly situated state employees have said protection. [1]

STATEMENT OF FACTS

Richards, a maintenance worker for A&M since 1992, suffered injury on the job in early 1998. (I C.R. at 13). As a result of Richards filing a worker's compensation claim, A&M, in retaliation for the same, terminated Richards' employment on April 3, 1998. (I C.R. at 13-14).

---

[1] Chapter 503 of the Texas Labor Code likewise omits the protections of the anti-retaliation law to University of Texas System employees. See "rEX. LAB. CODE 503.002(a)(omitting the applicability of Chapter 451). Chapter 503 was not before the trial court and is not directly at issue in the instant appeal; however, all arguments regarding Chapter 502 are equally applicable to Chapter 503.

SUMMARY OF THE ARGUMENT

The Equal Protection provisions of the United States Constitution and Texas Constitution mandate that individuals are treated equally under the law. Where similarly situated individuals are treated differently, Equal Protection requires that the difference in treatment be rationally related to a legitimate state goal.

The Texas Labor Code provisions governing worker's compensation law include an Anti-Retaliation Law that provides a right to relief to public employees who are retaliated against, inter alia, for filing a worker's compensation claim. However, this right is not afforded to public employees of Texas A&M University System; whereas, all other public employees of Texas, including those employed by other universities,[2] are provided this right under the law. Thus, similarly situated public employees of A&M are treated unequally under the law.

The State of Texas has failed to articulate what legitimate state goal is served by the unequal treatment or how the disparity is rationally related to such a goal. The trial court even stated in the order at issue, "This Court cannot comprehend why the legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas Tech system) while denying that same coverage to those employees of the A&M and UT systems." (II C.R. 250). The trial court went on to state, "There is no logical basis for the distinction." (Id.).

---

[2] Except those employed by University of Texas System. See note 1 *infra*.

Thus, because the public employees of A&M are unequally denied the rights bestowed by the Anti-Retaliation Law and because the State of Texas has failed to articulate how such unequal treatment is rationally related to a legitimate state goal, the statute must be stricken down insofar as it violates the Equal Protection of both the United States Constitution and the Texas Constitution.

ARGUMENT AND AUTHORITIES

Chapter 502 of the Texas Labor Code, which governs worker's compensation insurance coverage for employees of Texas A&M University System, violates the Equal Protection provisions of the United States Constitution and the Texas Constitution because, without any rational basis, it deprives A&M employees of the protections of the Texas Labor Code's Anti-Retaliation Law while all other similarly situated state employees have said protection.

A. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution mandates that a state must treat similarly situated individuals equally unless the difference in treatment is rationally related to a legitimate state goal.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall.., deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. Similarly, the Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to

exclusive separate public emoluments, or privileges, but in consideration of public services." TEX. CONST. ART I § 3.

To determine whether a particular statute violates Fourteenth Amendment Equal Protection, courts apply the rational basis equal protection test, which provides that similarly situated individuals must be treated equally under statutory classification unless there is "some legitimate articulated state purpose" for not doing so. *McGinnis v. Royster*, 410 U.S. 263,270, 93 S.Ct. 1055, 1059, (1973). The standard under the Texas Constitution is the virtually identical rational basis test: "[S]imilarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so." *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985). The disparate treatment must be rationally related to the goal the legislature sought to achieve by enacting the legislation. *Id* The United States Supreme Court recently reaffirmed this well-established standard:

> Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.

Board of Trustees of Univ. of Ala. v. Garrett, __ U.S. _, 121 S.Ct. 955, 964 (2001)(citing and quoting *Heller v. Doe,* 509 U.S. 312, 320, 113 S.Ct. 2637 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326 (1992); *New Orleans v. Dukes*, 427 U.S: 297, 303, 96 S.Ct. 2513 (1976) (*per curiam*)).

B. Public (and private) employees in Texas have the right to bring suit against their employers for

retaliating against them for filing a worker's com pensation claim; however, A&M employees are denied the right.

The Anti-Retaliation Law of the Texas Labor Code prevents an employer from discharging or discriminating against an employee for filing a worker's compensation claim in good faith or hiring legal representation in such a claim. TEX. LAB. CODE § 451.001. The Texas Supreme Court, in *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000), held that sovereign immunity was waived for purposes of the Anti-Retaliation Law and state employees could bring suit against state agencies under the Anti-Retaliation Law of Chapter 451 of the Texas Labor Code. The Court based its conclusion in part upon the language of Section 501.002 of the Texas Labor Code (formerly Section 15b of the 1989 State Applications Act) which expressly references the Anti-Retaliation Law (Chapter 451) and states, "For the purposes of this chapter and Chapter 451, the individual state agency shall be considered the employer." TEX. LAB. CODE 501 .O02(b); *see Kerrville*, 28 S.W.3d at 1.

Chapter 501, governs worker's compensation coverage for state employees, including employees of the Texas Tech University System, and Section 501.002(a), which provides for applicability of laws, expressly includes Chapter 451 among those applicable. TEX. LAB. CODE 501.002(a)(10). Likewise, Chapter 504 (governing employees of political subdivisions) and Chapter 505 (gov-eming employees of the Department of Transportation) also include Chapter 451 among the list of applicable worker's compensation laws. Id. § 504.002(a)(7); § 505.002(a)(10).

Although most state employees fall within the purview of Chapter 501 or 504, those working for A&M and the University of Texas System ("LIT"), however, do not. Worker's compensation for A&M employees is govemed by Chapter 502 and by Chapter 503 for UT employees. Id. §§502.001 - 502.070; §§503.001 - 503.071. Chapters 502 and 503 do not include Chapter 451 (the Anti-Retaliation Law) among the list of applicable worker's compensation laws. See TEX. LAB. CODE §502.002; §503.002.

The State argued, and the trial court agreed, that by not including Chapter 451 within the applicable provisions of Chapters 502 and 503, the legislature did not intend to waive sovereign immunity as to A&M and UT and thus a retaliated-against employee of A&M or UT has no cause of action against his employer. (II C.R. 248-249).

Thus, all public employees, as well as private employees, TEX. LAB. CODE §§401.012, 451.001, except those working for A&M and LIT, have a legal remedy when their employer retaliates against them for making a worker's compensation claim. All other employees, notably including employees of Texas Tech University, University of North Texas, and Southwest Texas State University, have the protection of the Anti-Retaliation Law. A&M and UT employees do not and, as similarly situated individuals, being treated unequally by the worker's compensation laws of Texas.

C. Nowhere in the record is there a trace of any rational basis or legitimate purpose for the unequal treatment of A&M employees.

Given that similarly situated individuals are being

treated unequally by the law, it falls upon the State to articulate a legitimate state goal and show that the disparity in treatmen is rationally related to that goal. *Garrett*,__ U.S. at__ 121 S.Ct. at 964; *Whitworth*, 699 S.W.2d at 197.

Nowhere in the record is there the slightest mention of the legitimate state goal being furthered by the unequal treatment of A&M and UT employees. The trial court in its order of dismissal confirms the lack of any articulated purpose, stating, "This Court cannot comprehend why the legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas Tech system) while denying that same coverage to those employees of the A&M and UT systems." (II C.R. 250). The trial court went on to state that there is no "logical basis" for the disparity in treatment between employees of Texas A&M and UT Systems and all other state employees. (Id.). The semantics of"logical" versus "rational" aside, "no logical basis for the distinction" is precisely the test for whether a statute is violative of the Equal Protection Clause -- that no rational basis exists for the disparity. *E.g., McGinnis v. Royster,* 410 U.S. 263,270, 93 S.Ct. 1055, 1059 (1973).

Regardless, it was incumbent upon the State to articulate a legitimate goal for the unequal treatment and demonstrate the rational relation between the unequal treatment and that goal. The State failed to do so.

CONCLUSION

Given that Section 502.002 of the Labor Code purports to exempt A&M from the Anti-Retaliation Law for workers' compensation, such section thereby treats similarly

situated individuals differently, and given that there is no rational basis for doing so, and particularly given that the State has not even proffered one, the exemption of A&M and UT from Chapter 451 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Texas Constitution.

PRAYER

WHEREFORE PREMISES CONSIDERED, Michael Richards respectfully requests that this Court reverse the trial court and strike down the provisions of the Texas Labor Code which violate the Equal Protection provisions of the United States and Texas Constitutions.

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I certify that a true and correct copy of the foregoing document, Brief of Appellant Michael Richards, has been delivered by certified mail, return receipt requested, to counsel listed below on this 20th day of July, 2001.

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(3)

Supreme Court, U.S.
FILED

04 427 SEP 22 2004

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

MICHAEL RICHARDS
Petitioner,

v.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY,
Respondents.

On Petition For Writ of Certiorari
To The Texas 10th Circuit Court of Appeals

APPENDIX VOLUME II

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APPENDIX E

IN THE
TENTH COURT OF APPEALS

No. 10-01-183-CV

MICHAEL RICHARDS,
Appellant

v.

TEXAS A & M UNIVERSITY SYSTEM
AND TEXAS A & M UNIVERSITY,
Appellees

From the 361st District Court
Brazos County, Texas
Trial Court # 47,822-361

OPINION

This is an appeal of an order dismissing a suit for want of jurisdiction. We state the facts largely as they appear in the pleedmgs of Michael Richards, appellant here and plaintiff in the trial court. For several years, Richards was employed as a maintenance worker by Texas A&M University System and Texas A&M University (collectively _TAMU"), appellees here end defendants in the trial court.

While so employed, Rtchards suffered injuries to his back and other injuries. After Richards filed a workers' compensation claim, TAMU terminated Richards's employment, Alleging that TAMU had terminated him in retailation for his Workers' compensation claim, Richards brought suit against TAMU under the "Anti-retailiation Law ". *See* TEX. LAB. CODE. ANN. chap. 451. (Vernon 1996). TAMU moved for dismissal, on the ground that they are immune from suit under the doctrine of sovereign immmunity. The trial court granted the motion and ordered the suit dismissed. Richards appeals. Richards presents an equal-protection challenge to the constitutionality of the Texas Workers' Compensation Act's. waiver, of governmental immunity for employees of some state educational institutions, but not for employees of other state institutions, agencies, and political subdivisions. *See Id.* tit. 5 (Vernon 1996 & Supp. 2004). This Opinion thus involves issues of constitutional law. *See* TEX. R. APP. 47.4 (b). We will affirm:

PRESERVATION

In the firstplace, TAMU contends that Richards did not preserve, his constitutional complaint for appellate review. TAMU argues Richards did not timely, affirmatively plead a constitutional claim in his petition and pray for injunctive relief. Richards was not required to seek injunctive relief in order to raise equal protection as a defense to TAMU's motion to dismiss, and need not have raised it until TAMU filed their motion.

Richards filed his original petition and his amended petition in 1998. In their answer, TAMU raised sovereign immunity as an affirmative defense to suit and to liability.

In 1999 and again in 2000, the trial court gave the parties notice of its intent to dismiss the suit for want of prosecution, time, Richards moved to retain the case on the court's docket, on the ground that the Texas Supreme Court's then-pending decision in *Kerrville State Hospital v. Fernandez* would settle the question of whether the State had waived sovereign immunity for suits by state employees under the Anti-Retaliation Law. *See Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1 (Tex. 2000). Each time, the court ordered the case retained.

In July, 2000, the Supreme Court decided *Kerrville State Hospital, id.* The Court held that the predecessor of Labor Code Section 501.002 waived sovereign immunity for anti-retaliation actions against state agencies covered by that law, *See id*, at 4-8.

In September, 2000, TAMU filed their motion to dismiss for want of jurisdiction, The motion contended that the State had not waived soveign immunity for suits by TAMU employees under the Anti-Retaliation Law, that TAMU were thus immune from Richards's suit, and that accordingly the trial court lacked subject-matter jurisdiction.

In February, 2001, Richards filed a response, loosely framing an-equal-protection argument. The next month, Richards filed a supplemental response, in which he expressly presents arguments under the equal-protection clauses of the United States and Texas Constitutions.

In May, 2001, the trial court granted TAIVIU's motion to dismiss. The court noted:

> This Court cannot comprehend why the Legislature would see fit to provide anti-retaliation coverage for certain state employees (including educational employees of the Texas [T]ech system) while draying that same coverage to those employees of the A&M and UT systems. There is no logical basis for the distinction.

Nonetheless, the court expressly overruled Riehards's equal-protection argument.

The next day, Richards filed a motion for reconsideration of the court's order, again urging that the Workers' Compensation Act irrationally and therefore unconstitutionally discriminated against employees of TAMU.

It is true, as TAMU argue, that Texas common law does not recognize a cause of action in tort for money damages for a violation of the Texas Constitution. *See City of Beamont Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995). Richards, however, manifestly seeks damages under the Anti-Retaliation Law, a statutory cause of action, and not under the Texas Constitution.

Richards's constitutional argument, too, is timely. The Texas Rules of Appellate Procedure require a "timely" complaint in the trial court in order to preserve the complaint for appeal.TEX. R. APP. P. 33.1(a). In order to be timely, a complaint must be raised at a time when the trial court has the power and opportunity to correct the error alleged. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999). An objection is timely if made "as soon as the ground of objection becomes apparent." *Kerr McGee*

Corp. v. Helton, No. 07-01-0263-CV, 2002 Tex. App. LEXIS 566, at *8 (Tex. App.–Amarillo Jan. 28, 2002), *rev'd on other grounds,* 47 Tex.Sup.Ct. J. 248, 2004 Tex. LEXIS 63 (Tex. Jan. 30, 2004); *accord Aguilar v. State*, 26 S.W.3d 901, 905-906 (Tex.Crim. App. 2000). Richards need not have raised equal protection as a defense to TAMU's assertion of sovereign immunity before TAMU filed their motion to dismiss asserting immunity from suit. After TAMU filed their motion to dismiss, and before the court ruled on the motion, Richards filed responses raising the denial-of-equal-protection complaint. After the trial court granted TAMU's motion, Richards filed a motion for reconsideration, again arguing equal protection. Richards thus timely and specifically presented his equal-protection complaint to the trial court. This issue is adequately preserved.

LEGAL BACKGROUND

Sovereign Immunity

The doctrine of sovereign immunity, of course, predates the United States Constitution. *See Alden v. Maine*, 527 U.S. 706, 711-30 (1999). As a matter of natural law or the law of nations, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" *Id.* at 716 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)) (emphasis in THE FEDERALIST). A. "Sovereign[] is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Hercules, Inc. v. United States*, 516 U.S. 417, 422 (1996). The states are sovereigns for purposes of sovereign immunity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S.

743, 751-53 (2002). As the Texas Supreme Court has put it, "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003)(quoting *Hosner v. De Young*, 1 Tex. 764, 769 (1847)).

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n*, 535 U.S. at 760. "[M]ore concretely," however, state sovereign immunity protects against "raids on state treasuries." *Alden*, 527 U.S. at 720.

In Texas, sovereign immunity, unless waived, includes immunity from suit and immunity from liability. *Wichita Falls State Hosp.*, 106 S.W.3d at 696. In the absence of waiver of immunity from suit, a trial court lacks subject-matter jurisdiction in a suit against the State. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

Equal Protection

Riehards argues for relief under the equal-protection provisions of the United Sates and Texas Constitutions.

The Equal Protection Clause of the United States Constitution provides:

> No State shall... deny to any person within its Jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. "[T]he Equal Protection Clause 'is essentially a direction that all persons similarly

situated should be treated alike[.]' " *Nguyen v. Immigration & Naturalization Serv*, 533 U.S. 53, 63 (2001) (quoing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

The Bill of Rights of the Texas Constitution provides for equal protection in the following terms:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

TEX. CONST. art. I, § 3.

Texas ceurts have generally assumed that an equal-protection analysis can be applied to the issue of the waiver of sovereign immunity. *E.g., Tex. Dep't of Health v. Rocha*, 102 S.W.3d 348, 355 (Tex. App.–Corpus Christi 2003, no pet.) (TEX.CONST.); *Gulf Electroquip, Inc. v. Univ. of Tex. at Austin*, No. 14-00-01149-CV, 2002 Tex. App. LEXIS 2313, at *11-*12 (Tex. App.–Houston [14st Dist.] Mar. 28, 2002, pet. denied) (not designated for publication) (U.S. CONST.). The highest court of at least one state has held that the waiver of sovereign immunity cannot violate the Equal Protection Clause. *See Riddle v. Ashe*, 495 S.E.2d 287, 288-89 (Ca. 1998). In that case, reasoning that since the Equal Protection Clause "protects only rights, not mere privileges," and since "[a] waiver of sovereign immunity is a mere privilege, not a right, and the extension of that privilege is solely a matter of legislative grace, " the Court concluded that "discrimination in the grant of privileges is not a denial of equal protection to those who are not favored." *Id.* We

assume without deciding that the waiver of sovereign immunity may be analyzed under equal-protection standards.

The equal-protection analysis under the federal Equal Protection Clause "applies to equal protection challenges under the Texas Constitution." *Bell v. Low Income Women*, 95. S.W.3d 253,266 (Tex. 2002).

Under that analysis, social and economic legislation that does not discriminate against a protected class or implicate a fundamental right is evaluated on a rational-basis standard. *See Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 127-28 (1999) (per curiam). Such legislation includes workers' compensation legislation. *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 524 (Tex. 1995). "Under rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees v. Garrett*, 531 U.S. 356, 366-67 (2001) (quoting *City of Cleburne*, 473 U.S. at 441). "Such a classification cannot run afoul of the Equal Protection Clause if there is a ratioual relationship between the disparity of treatment and some legitimate governmental purpose. " *Id.* at 367. That is, legislation survives an equal-protection challenge so long as the legislation is "rationally related to a legitimate state interest." *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). A state interest is legitimate so long as it does not "run afoul of some specific federal constitutional prohibition, or of some valid federal law." *See Lincoln Fed. Labor Union v. N. W. Iron & Metal Co.*, 335 U.S 525, 536 (1949).

Government employees are not a protected class for equal-protection proposes. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976).

As a matter of separation of powers, the judicial branch presumes that the actions of the legislative branch are constitutional. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The legislative Record need not show the legislature's reasons. *Garrett*, 531 U.S. at 367. Rather, the party challenging constitutionality of legislation has the burden "to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.' " *Id.* (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993))(internal quotation omitted). The rational basis conceived of by the reviewing court need not be the one that actually motivated the legislature. *See Fed. Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). For example, In *Williamson v. Lee Optical of Oklahoma, Inc.*, the United State Supreme Court hypothesized reasons for a statute that permitted ophthalmologists and optometrists, but not opticians, to fit or duplicate eyeglass lenses. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 485-86, 487, 490-91 (1955).

Texas Workers' Cempensation Act

The Workers' Compensation Act, of course, creates a comprehensive insurance system for workplace injuries to employees of subscribing employers. See TEX. LAB. CODE ANN. tit, 5. The Act's social and economic purposes include simplifying and rationalizing compensation to employees for workplace injuries, and limiting tort liability for employers.

See Payne v. Galen Hosp. Corp., 28 S.W.3d 15, 17 (Tex. 2000); *Garcia*, 893 S.W.2d at 510-16.

The Act generally provides for coverage for employees of the State of Texas and of Texas state agencies, that is, for persons "in the service of the state pursuant to an ... express oral or written contract of hire." TEX. LAB. CODE ANN. § 501.001(5)(A) (Vernon Supp. 2004); *see id.* § 501.021 (Vernon 1996). Within this general provision for state employees, the Act expressly includes employees of Texas Tech University, of Texas Tech University Health Sciences Center, and of institutions under the boards of regents of those institutions. *Id.* § 501.022(a) (Vernon 1996). The Act also separately provides for coverage for employees of political subdivisions of the state. *Id.* § 504.011 (Vernon 1996).

From this general coverage of state employees, however, the Act excepts the employees of three state agencies, to the extent that those employees are covered by other sections of the Act: the University of Texas System, the Texas A&M University System, and the Texas Department of Transportation. TEX. LAB. CODE ANN. § 501.024(5)-(7) (Vernon Supp. 2004). Other provisions of the Act specifically provide for coverage of employees of these agencies. *See id.* § 502.021(a) (Vernon 1996) (Tex. A&M Univ. Sys.); *id.* § 503.021(a) (Vernon 1996) (Univ. of Tex. Sys.); *id.* § 505.011 (Vernon 1996) (Tex. Dep't of Transp.).

In specifically providing for coverage for employees of these three agencies, those subchapters generally adopt definitional and other sections of the Act, modifying them as necessary, to the extent that the general sections are not

inconsistent with the specific subchapters. TEX. LAB. CODE ANN. §§ 502.002, 503.002, 505.002 (Vernon 1996). The subchapters providing for coverage for state employees generally and those spccifically providing for coverage of employees of political subdivisions and the Department of Transportation expressly adopt Chapter 451, the Anti-Retaliation Law. *See id.* §§ 501.002(a)(10), 504.002(a)(7)(Vernon Supp. 2004); *id.* § 505.002(a)(10) (Vernon,1996). The subchapters providing for coverage for employees of the A&M System and the UT System do not adopt Chapter 451. *Cf. id.* §§ 502.002(a), 503.002(a).

Anti-Retaliation Law

Chapter 451 of the Texas Labor Code, commonly called the Anti-Retaliation Law, provides, "A person may not discherge or in any other manner discriminate against an employee because the employee has... filed a workers' compensation claim in good faith" or otherwise participated in a workers' compensation claim or suit in specified ways. TEX. LAB. CODE ANN. § 451.001; *see Kerrville State Hosp.*, 28 S.W. 3d at 4 & n.l. The purpose of the Law is "to protect. persons who are entitled to benefits under the Worker's Compensation Act and to prevent there from being discharged for filing claims to collect such benefits," *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997) (per curiam). The Law is thus a statutory exception to the common-law employment-at-will doctrine. *Alayon v. Delta Air Lines, Inc.*, 59 S.W.3d 283,287 (Tex. App.–Waco 2001, pet. denied).

The Anti-Retaliation Law expressly waives sovereign immunity from suit by employees of those agencies to

which the Law applies. *See Kerrville State Hosp.*, 28 S.W.3d at 9 (state employees under TEX. LAB. CODE chap. 501); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 296 (Tex. 1995) (employees of political subdivisions under TEX. LAB. CODE chap. 504).

ANALYSIS

Richards does not contend that the review of the Workers' Compensation Act is under any heightened scrutiny. Nor does Richards contest that the Legislature did not intend to waive sovereign immunity for employees of the UT and A&M systems. The only contested matter is whether, in not waiving immunity for those employees, while waiving it for state employees generally, the Legislature denied Richards equal protection. It did not.

Richards argues that TAMU fail to state a rational basis for the distinction betweem the two educational institutions and other state agencies. Richards thus misstates the parties' burdens. The argument of TAMU, both at trial and on appeal, would have been more helpful had they developed speeific reasons, grounded in the lagislative history, for the Legislature's drawing the distinction that it did. Nonetheless, the burden to overcome the strong presumption in favor of the constitutionality of a statute, both at trial and on appeal, rests on the party challenging the statute. Thus, the burden remains on Richards to demonstrate that under no conceivable state of facts is the distinction rational.

Likewise, Richards puts great weight on the trial court's statement that there was no "logical" reason for the distinction between these two educational institutions and

other state agencies. Trial court findings have little effect on the review of the constitutionality of a statute. *Garcia*, 893 S.W.2d at 519-20. Again, on appeal, as at trial, Richards bears the burden of establishing that no rational basis for the distinction exists. Since we can conceive of a rational basis, Richards fails to meet this burden.

We must hold a statute constitutional against an equal-protection challenge unless we can conceive of no rational basis for the distinction drawn by the statute. The Texas Supreme Court has upheld the Workers Compensation Act against general equal-protection challenges: *Garcia*, 893 S.W.2d at 525, 531, 532, 533. The Eastland Court of Appeals, too, has held that the UT System's retention of sovereign immunity against anti-retaliation suits, under circumstances corresponding to the A&M System's, did not deny UT System employees equal protection. *See Clark v. Univ. of Tex. Health Science Ctr.*, 919 S.W.2d 185, 188 (Tex. App.–Eastland 1996, writ denied).

Only One rational basis for the difference in protection is needed. We have identified at least one possible rational basis for this distinction. The A&M and UT systems are the only state educational institutions for whose employees the State has not waived sovereign immunity from suit under the Anti-Retaliation Law. Those institutions also share the distinction of being the only state educational institutions that are authorized to meet their workers' compensation obligations by self-insurance. *See* TEX. LAB. CODE ANN. §§ 502.022, 503.022 (Vernon 1996). The distinction between insured and self-insuring entities can constitute a valid rational basis for a distinction between them. For example, the Supreme Court of Mississippi has held that a statute that

waived sovereign immunity for municipalities that participated in an insurance plan, but did not waive it for municipalities that self-insured, did not deny equal protection. *Mosby v. Moore,* 95-CA-00672-SCT, ¶¶ 17-21 (Miss. 1998), 716 So.2d 551; 555-56.

The costs of workers' compensation, insuran_ claims and suits can be high and unpredictable.. A self-insuring entity, of course, does not enjoy the primary benefits of insurance which are to limit the entity's exposure by distributing liability over many insureds. Cf. Reed Tool Co. v. Copelin, 689 S.W.2d 404, 407 (Tex. 1985). The Legislature may have believed that it was necessary to protect the A&M and UT systems from the additional risks and burdens of potentially large anti-retaliation lawsuits. Although we have no reason to believe that those institutions discharge employees for filing workers' componsation claims or suits, the costs of defending against or settling employment suits, even suits that the defendant believes are groundless, can be substantial. Richards, for instance, pleaded for damages for lost income, lost earning capacity, past and future mental anguish, and loss of enjoyment of life, for punitive damages, and for attorney's fees. The A&M and UT systems' liability as workers' compensation self-insurers distinguishes them from other state educational institutions, for whose employees the State has waived sovereign immunity for anti-retaliation suits.

Richards argues that the conservation of the State's limited financial resources cannot be a rational basis for the decision not to waive sovereign immunity. To the contrary, "to protect the public treasury" is one of the prime reasons for modern sovereign immunity. *Wichita Falls State Hosp.*, 106 S.W.3d at 695. In detertmining the political question of

whether to waive immunity, the Legislature's chief difficulty is to balance the equitable considerations favoring waiver against the fiscal considerations warning against waiver. In connection with sovereign immunity, the Legislature has stated its "interest in managing state fiscal matters through the appropriations process." TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2004). The Supreme Court has also acknowledged "the Legislature's interest in protecting the State's financial resources." *Wichita Falls State Hosp.* at 701. This interest arises from the fact that "[subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward lawsuits and paying judgments." *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.2d 849, 854 (Tex. 2002) (plurality op.). Thus, even "when waiving immunity ... the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors." *Wichita Falls State Hosp.* at 698. In this situation the Legislature provided employees with certain benefits under the workers' compensation system but did not waive immunity for suit under the anti-retaliation provisions of the Workers' Compensation Act.

Limiting the potential liability of TAMU, which can self-insure for workers' compensation coverage, would be a proper consideration in deciding whether to waive sovereign immunity Accordingly, the determination not to waive sovereign immunity for anti-retaliation suits against TAMU, while waiving it for other state agencies, would have a

rational basis. Thus, we overrule Richards's issue.[1]

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[1] We respond briefly to the concurding opinion. To the extent that the concuring opinion states that Richard's "complaint should be addressed to the " Legislature, we heartily agree. "[T]he Legislature is better suited to balance the conflicting policy issues associated with waiving immunity" than are courts. *Wichita Falls State Hosp.*, 106 S.W.3d at 695. To the extent, however, that the concurring opinion concludes that we have no power to grant Richards relief, had we found harmful error, we cannot agree. "In Texas, the bar of sovereign immunity is a creature of the common law and not of any legislative enactment." Tex. A&M Univ.-Kingsville v. Lawson, 87 S.W.3¢I 518, 520 (Tex. 2002) (plurality op.) (citing *Hosner*, I Tex, at 769). "Historically," courts "have left to the Legislature whether to waive sovereign immunity." *Id.* at 520 (quoting Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 595 (Tex. 2001)). The policy reasons for deferring the political question of the waiver of sovereign immunity to the Legislature are weighty, and they are sound. *See Fed. sign v. Tex. S. Univ.*, 951 S.W.2d 401, 413-15 (Tex. 1997) (Hecht, J., concurring). But the Supreme Court has "not absolutely foreclosed the possibility that thejudiciary may abrogate immunity by modifying the common law," *Wichita Falls State Hosp*, at 696. We cannot confidently conclude that in no case of a serious deprivation of constitutional rights, would other considerations outweigh the policy reasons in favor of deference to the Legislature.

CONCLUSION

Having overruled Richard's sole issue, we affirm thhe trial court's judgment.

TOM GRAY
Chief Justice

Before Chief lustice Gray,
Justice Vance, and
Justice Rcyna[2]
(Justice Vance concurring)
Affirmed
Opinion delivered and filed February 11, 2004
[CVo6]

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2 This case was submitted with former Chief Justice Davis on the panel, but he resigned effective August 4, 2003. Justice Reyna, who took the oath of office on January 5, 2004, participated in the decision of the Court.

IN THE
TENTH COURT OF APPEALS

No. 10-01-183-CV

MICHAEL RICHARDS,

Appellant

v.

TEXAS A& M UNIVERSITY SYSTEM
AND TEXAS A & M UNIVERSITY,

Appellees

From the 36ist District Court
Brazos County, Texas
Trial Court # 47,822-361

CONCURRING OPINION

Richards essentially argues that the absence of a statute waiving sovereign immunity as to A&M amounts to a denial of equal protection because the legislature has waived sovereign immunity for workers' compensation retaliation suits under Texas Labor Code Chapter 451, for all state agencies other than the University of Texas and Texas A&M University. "I agree to affirm the trial court's judgment of dismissal for want of jurisdiction.

SOVEREIGN IMMUNITY

It is axiomatic that sovereign immunity protects the State of Texas, its agencies and its officials from lawsuits for damages absent legislative consent to sue the State. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401,405 (Tex. 1997).

Richards asks us to do something we cannot do: write a statute that waives sovereign immunity for employees of A&M who want to sue for wrongful discharge after filing a compensation claim. *See Lynch v. Port of Houston Auth.* 671 S.W.2d 954, 957 (Tex. App.–Houston [14th Dist.] 1984, writ ref'd n.r.e.) ("Such a drastic and fundamental change [as to abrogate the doctrine of sovereign immunity] should be made, if at all, by the legislature or the Supreme Court."); *see also Miller v. Albright*, 523 U.S. 420, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (Scalia, L concurring) ("[T]he Court has no power to provide the relief requested.").

Richards' complaint should bo addressed to the legislature. Bocause the legislature has not abrogated sovereign immunity in this context and the Supreme Court has not addressed it, it remains intact.[1] The trial court's dismissal was correct.

BILL VANCE
Justice

Concurring opinion delivered and filed February 11, 2004

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[1] Thus, the appropriate rationale is found in footnote 1 of the majority's opinion, recognizing that Texas courts have not waived sovereign immunity. That being the case, a discussionn of thhe merits of thhe equal protectionn argument is immaterial.

APPENDIX F

NO. 10-01-183-CV

IN THE TENTH COURT OF APPEALS
WACO, TEXAS

MICHAEL RICHARDS
APPELLANT

V.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY
APPELLEES

Received FEB 26 2004

On Appeal from the 361st Judicial District Court
Brazos County, Texas
Cause No. 47,822-361

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IN THE TENTH COURT OF APPEALS
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II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as declared by the legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employees of the University of Texas A&M and the University of Texas Systems? 3

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ISSUES PRESENTED

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as declared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employees of the University of Texas A&M and the University of Texas Systems?

III. Do Chapters 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose?

ARGUMENT AND AUTHORITIES

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

Courts have long recognized that not all state purposes are legitimate, [1] Limits on legitimate state purposes are critical, because the very purpose of the Equal Protection Clause is to protect from "arbitrary " distinctions in the law, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Avery v. Midland County*, 390 U.S. 474, 484 (1968). If courts were blind to the capriciousness of certain legislative purposes, then the Equal Protection clause would be empty. The United States Supreme Court, however, has recognized some boundaries beyond which a state legislature's purpose is no longer legitimate. *Day-Brite Lighting, Ihe. v. Missouri*, 342 U.S. 421,423 (1952). Specifically, a state purpose is not legitimate if that purpose violates a constitutional provision or conflicts with federal law. *Id.*

Besides the boundaries recognized by the United States Supreme Court, the legislature's purpose is illegitimate when that purpose violates a legislatively announced public policy. If a state could violate its own public policy, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law. *Olech*,

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[1] Texas courts look to the federal courts for guidance in interpreting the Equal Protection Clause of the Texas Constitution, because similar factors are involved in both provisimas. *See e.g. Whitworth v. Bynum*, 699 S.W.2d 194, 197 n.5 (Tex. 1985) (discussing Tex. Const. art, I, § 3).

528 U.S. at 564; *Avery*, 390 U.S. at 484. For example, the State of Texas could choose to save money by excepting the Texas A&M and University of Texas ("A&M & UT") Systems from the Texas Whistlebiower Act, TEX. GOV'T CODE § 554.001, El seq. If this were the case, if an employee of the A&M or UT Systems reported an illegal activity, the A&M and UT Systems could retaliate against a reporting employee by firing the employee, and the employee would have no remedy despite the Whistleblower Act's legislatively approved public policy of preventing such retaliation. Clearly in this example, the state legislature's purpose would be arbitrary, even if the legislature's purpose did not contravene the constitution or a federal statute.

The Texas Whistleblower Act's goal in protecting reporting employees from retaliation is analogous to the case at bar. As pointed out above, in the example cited, it is the retaliation for making such a report that is protected. Without the protection against such retaliation, an employee would likely be hesitant to make a Whistleblower report, and some reports would, of course, not be made at all. If our legislature dared to exempt A&M and UT System employees from the Texas Whistleblower Act's protections because it would save the State of Texas money, which it most certainly would, there would be a great outcry because there simply is no legitimate purpose for such a distinction between similarly situated employees. While money could and would be saved by failing to protect all such employees from such retaliation, there is no rational support for such an illegitimate distinction. The legislature's power to distinguish between similarly situated employees is not unbridled. Any effort by the legislature to make distinctions between similarly situated employees must not only have a basis, but that

result must be a rational basis founded in a legitimate purpose.

The Equal Protection Clause clearly imposes limits on the "legitimate purposes" a state can claim to justify treating similarly situated employees differently. This Court can not give legitimacy to a legislative purpose that illegitimately violates a public policy that has been announced by the state legislature. In the case at bar, just like in the Whistleblower example above, without the protection against retaliation for filing a workers' compensation claim, claims will go unreported for fear the employee will lose his or her job. There is no legitimate purpose behind a legislative attempt to deny protection to A&M and UT System employees from retaliation for filing for workers' compensation benefits.

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as deelared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employees of the University of Texas A&M and the University of Texas Systems?

The Texas legislature has given all public and private employees a remedy when their employer retaliates against them for filing a workers' compensation claim. But the legislature has denied that remedy to employees of the A&M and UT Systems. TEX. LABOR CODE §§ 502.070 - 502.070; §§ 503.001 - 503.071. To justify the legislature's distinction, this Court identified a single legitimate state purpose-to save the

state money. 2 **Appendix A, p. 12-13.**

The fact remains that this state purpose, saving the state money, violates the public policy of Texas, as atmounced by the state legislature in the Texas Workers' Compensation Act. § 401.001 El. seq. The Act's overarching purpose is to ensure that employees who are injured on the job receive prompt remuneration. *Paradissis v. Royal Indemnity Co.*, 507 S.W.2d 526, 529 (Tex. 1974). In most cases, the Act is an injured employee's exclusive remedy for work-related injuries. § 408.001 (a). Given that an employee often has a remedy only under the Act, the legislature recognized that employers could escape workers' compensation liability by retaliating harshly against employees who filed workers' compensation claims, because workers would be discouraged from pursuing claims. *See Trico Technologies, Corp. v. Montiel*, 949 S.W.2d 308, 312 (Tex. 1997); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362, 367 (Tex. App.-El Paso 2002, no pet.). Thus, the legislature has declared that the anti-retaliation provisions of the Act are critical to supporting the public policy of providing injured workers with prompt remuneration.

Stripped of the Act's protections against retaliation, employees of the A&M and LIT Systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation china. This fear of

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[2] Curiously, this Court doubts whether A&M fires its employees for filing workers' compensation claims. **Appendix A. p. 13.** But the Court will never know ifA&M retaliates against its employees, so long as the Court refuses to allow Richards to go forward with his case!

retaliation will create a chilling effect, as fewer and fewer workers take advantage of the prompt remuneration provided by workers' compensation. If one worker chooses to suffer with untreated and/or uncompensated injuries rather than risk losing his or her job for filing a claim, that is one worker too many. Indeed, a right unprotected is no right at all. Because of this Court's ruling, the UT and A&M Systems may, in effect, save the state some money because their employees will not want to risk filing workers' compensation claims and risk losing their jobs. The Texas Legislature's scheme to deny employees at their flagship institutions the protection against retaliation for filing workers' compensation claims may be a money maker for our State, but the cost of "saving" this money is too high and has no legitimate purpose.

This Court has found that saving money is our legislature's sole rational basis for excluding A&M and UT System employees from the anti-retaliation protection of the Workers' Compensation Act. But, in this limited context, Richards contends that saving money is not a legitimate legislative purpose. The Equal Protection Clause can not be interpreted to allow A&M and UT System employees to be stripped of their right to be protected when filing workers' compensation claims, while all other private and public employees enjoy this protection. If the Court idly stands by today, and fails to recognize this complained of action as being an illegitimate purpose, what other arbitrary violations of public policy will the Court tolerate? It is not too far a stretch of the imagination to think that, in the example cited herein, the legislature might next abrogate the rights of A&M and UT System employees by taking away their right to be protected from retaliation when making Whistleblower reports. A legislature's power to make such arbitrary

distinctions between similarly situated employees is not unbridled. The Equal Protection Clause does not require that there be just "some basis" for a distinction between similarly situated employees, but that the distinction is a"rational basis" supported by a legitimate purpose. The legislature has no legitimate purpose here because violating state policy, as created by the legislature, can never be a legitimate purpose to support such a distinction.

The Court cites *Clark v. Univ. of Tex. Health Science Ctr.*, 919 S.W.2d 185, 188 (Tex. App. - Eastland 1996, writ denied) in an effort to follow its sister Court which upheld Chapter 503 from an Equal Protection challenge. **Appendix A**, p. 12. However, the Eastland Court's decision is bad law, While citing the Equal Protection Clause, the Eastland Court applied a Due Process analysis. Specifically, the Eastland Court held that *Clark* did not have a property interest, *Id.* at 188. However, lack of a property interest is relevant to a Procedural Due Process analysis, not an Equal Protection Clause analysis. *Am. Mfr. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59 (1999). This Court should not rely on an opinion that misses the point and uses a flawed analysis in reaching its opinion.

The legislature's purpose of saving money by denying A&M and UT System employees from making claims of retaliation for being fired after filing a workers' compensation claim violates the public policy announced in the Act. The policy of the Workers' Compensation Act is to provide injured employees with prompt remuneration. *See Paradissis*, 507 S.W.2d at 529. Accordingly, this Court should refuse to recognize that saving the state money alone is a legitimate state interest and rational basis to deny

workers at A&M and UT the protections given to all other workers in the State of Texas.

III. Do Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose?

Under the United States and Texas Constitutions, a state statute survives rational basis scrutiny only when the statute is rationally related to a legitimate state purpose. *Board of Trustees of the University ofAlabama v. Garrett*, 531 U.S. 356, 367 (2001); Whitworth, 699 S.W.2d at 197. Here, the Appellees have failed to articulate a legitimate state purpose, because saving the state money is not a legitimate purpose as detailed herein. Therefore, Chapters 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions.

PRAYER

Michael Richards respectfully requests that this Court reconsider its panel decision issued on February 11, 2004. Appendix A. Specifically, Richards requests that this Court reverse the trial court and find that Chapters 502 and 503 of the Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because they fail to provide protection against retaliation for filing a workers' compensation claim, a protection granted all other State employees. Richards further asks sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings that are consistent with this Court's opinion.

Respectfully Submitted,

WEST, WEBB, ALLBRITTON,
GENTRY& R/FE, P.C.

By: /s/ Gaines West

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copyof the foregoing document has been sent by overnight delivery to the following on this the 26th day of February 2004.

Brad McClellan
ASSISTANT ATTORNEY GENERAL
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/s/ Gaines West
Gaines West

CERTIFICATE OF CONFERENCE

Counsel for Appellant has contacted counsel for Appellees regarding the filing of this motion. Counsel for Appellees opposes the filing of this motion.

/s/ Gaines West
Gaines West

APPENDIX G

TENTH COURT OF APPEALS

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March 10, 2004

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RE: Court of Appeals Number: 10-01-00183-CV
Trial Court Case Number: 47,822-361

STYLE: Michael Richards
v.
Texas A&M University System
and Texas A&M University

Appellant's motion for rehearing was denied today.

Justice Vance would grant rehearing and issue the concurring opinion as that of the court.

Sincerely,
Sharri Roessler, Clerk

/s/ Nell Hegefeld
By: Nell Hegefeld,
Deputy Clerk

APPENDIX H

NO. 10-01-183-CV

IN THE SUPREME COURT
OF TEXAS

MICHAEL RICHARDS
PETITIONER

V.

TEXAS A&M UNIVERSITY SYSTEM
AND TEXAS A&M UNIVERSITY
RESPONDENTS

COPY

On Appeal from the 361st Judicial District Court
Brazos County, Texas
Cause No. 47,822-361

PETITION FOR REVIEW

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NO. 10-01-183-CV

IN THE SUPREME COURT
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PETITIONER

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II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public policy, as declared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers' Compensation Act with regard to employ ees of the Texas A&M and the University of Texas Systems? 6

III. Do. Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the united States and Texas Constitutions because the Appellees have failed to articulate a legitimate state purpose? 10

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STATEMENT OF THE CASE

On August 25, 19981 Michael Richards fried suit against the Texas A&M University System and Texas A&M University (collectively, "A&M ") in the 361st District Court of Brazos County, Texas. Specifically, Richards alleged that A&M violated the anti-retaliation provisions of the Texas Workers' Compensation Act by firing him for filing a workers' Compensation claim. Before trial, Judge Steve Smith granted A&M's Motion to Dismiss for Want of Jurisdiction based on sovereign immunity and dismissed Richards' suit. Richards noticed his appeal on May 30, 2001.

In the Tenth Court of Appeals, Richards was the Appellant, and the Texas A&M University System and Texas A&M University responded as the Appellees. On February 11, 2004, the Court of Appeals issued an unpublished Opinion authored by Chief Justice Tom Gray joined by JustiCe Felipe Reyna. Justice Bill Vance filed a concurring.opinion. The Court of Appeal s affirmed the Trial Court's dismissal of the case. On March 10, 2004, the Court of Appeals denied Richards' Motion for Rehearing in a letter ruling, noting that Justice Vance Would grant the rehearing and.issue hiS concurring opinion as that of the Court.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over Richards' appeal because the case involves a constitutional challenge to the validity of a statute that is necessary to the determination of the Case. Further, the Court of Appeals has committed an error of law of such importance to file State's.jurisprudence that it Should be corrected.

ISSUES PRESENTED FOR REVIEW

I. Does a state have a legitimate state purpose if that purpose violatesthe state's public policy as declared by the legislature?

II. Does theAppellees' proffered legitimate state purpose 0f saving the state money violate public policy, as deciared by the Texas legislature, when the legislature's scheme eviscerates, the Texas Workers' Compensation Act with regardto employees of Texas A&M and the University of Texas Systems?

III. Do Chapter 502 and 503 of the Texas Labor Code violate the. Equal Protection Clanse of the United States and Texas Constitutions because the Appellee s have failed to articu late a legitimate state purpose?

IV Do Chapter 502 and 503 of the Texas Labor Code withstand strict scrutiny under the United States and Texas Constitution?

A. Was race a motivating factor to the Texas legislature in enacting Chapter 502 and 503 when these statutes have a disparate impact on minorities?

B. Are Chapter 502 and 503 narrowly tailored to further a compelling state interest?

STATEMENT OF FACTS

Richards Was employed as a maintenance worker for A&M and suffered an on-the-job injury, in early 1998: I C.R. 13. On April 3, 1998, A&M fired Richards in .retaliation for filing a.workers' compensation claim. I C.R. 13-14.

Consequently, Richards filed suit against A&M under the anti-retaliation provisions of the. Texas Workers' Compensation Act. I C.R. 2:5. Before trial, Judge Steve Smith granted A&M's Motion to Dismiss for Want of Jurisdiction based on and dismissed Richards' suit. II C.R. 248-51. Richards noticed his appeal on May 30, 2001. II C.R. 263.

In the Tenth Court of Appeals, Richards was the Appellant, and the Texas A&M University System and Texas A&M .University responded to Richards' appeal as the Appellees. On February 11, 2004, the Court of Appeals issued anunpublished opinion authored by Chief Justice Tom Gray joined by Justice Felipe Reyna. Justice Bill Vance filed a concurring opinion. Tab 1. The Court of Appeals aff'umed the Trial Court's dismissal of the case. Tab. 1. on March 10, 2004, the Court of Appeals denied Richards' Motion for Rehearing ina letter ruling. Tab2. In denying Richards' MotiOn for Rehearing, the Court of Appeals noted that Justice Vance would grant the rehearing and issue his concurring opinion as that of the Court: Tab 2.

The Court of Appeals Correctly identified Richards' challengeto Chapters 502 and 503 of the Texas Labor Code as based on the Equal Protection Clause of the United States and Texas Cons6tutions. The Court's opinion, however,

misapprehends the nature of his Equal Protection challenge. Justice Gray holds that saving the State money is a rational basis to justify ttie statutes' discriminatory effects. Tab .1., p. 13. Rather, Richards contends that saving the state money is not a *legitimate governmental purpose* when it violates public policy as announced by the Texas Legislature in the Workers' Compensation Act

SUMMARY OF THE ARGUMENT

The Texas Workers Compensation Act implements the legislature's public policy of providing prompt remuneration to injured workers. The Act's anti-retaliation provisions are vital to its purpose, because, without them, employers can fire employees Who file claims and face no. consequences. Injured employees would hesitate to file Claims for benefits, in fear of being fired. Indeed, a right unprotected is no right at all.

But the legislature has refused to protect the fights of employees of the Texas A&M University System and University of Texas System ("UT System"), because the state has retained sovereign immunity, against the anti-retaliation claims of these two groups while waiving sovereign immunity, as to all other state agencies. On their face, these statutes implicate the Equal Protection Clause of the United States and Texas Constitutions. Surprisingly, the Court of Appeals Cited only one state purpose in upholding the Statutes: save the state money.

However, this purpose, to save the state money, in this context is not a legitimate purpose because it violates the Act's legislatively announced public policy of providing

injured workers with prompt remuneration. Without the protection of Act's anti-retaliation provisions, injured workers at the A&M and UT Systems may avoid the threat of being fired by Simply Choosing to not make: a: Worker's Compensation claim and go uncompensated. Thus, the impact of the Court of Appeals' decision is that literally thousands of state employees in these two University Systems are singled out and denied an effective remedy for their work-related injuries.

Furthennore, racial discrimination was an apparent motivating factor behind the anti-retaliation protection from its workers' compensation scheme for legislature deleting the A&M and UT Systems. Not only does the Act burden a group of workers who are disproportionately minorities, but the legislature enshrined a discriminatory System that was in place for over twenty years. Therefore, the Act must also meet the strict scrutiny to comply with the Equal Protection Clause. Nonetheless, the Act fails Such strict scrutiny.

This Court should exercise. its discretion to review Richards' case, because the impact of the Court of Appeals' decision is of Such importance to the state's jurisprudence that it should be corrected. As a further basis for the Court's jurisdictitm, Richards has challenged the validity of Chapters 502 and 503 of the Texas Labor Code based on the Equal Protection Clause of the United States and Texas Constitutions. Accordingly, Richards respectfully asks this Court review the Court of Appeals' decision.

ARGUMENT AND AUTHORITIES

I. Does a state have a legitimate state purpose if that purpose violates the state's public policy as declared by the legislature?

Courts have long recognized that not all state purposes are legitimate state purposes are critical,because the very purpose of the Equal Protection Clause of the United States and Texas Constitutions is to protect citizens from arbitrary distinctions in the law. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (U. S. CONST. amend. XIV, §1); *Avery v. Midland County*, 390 U.S. 474, 484 (1968); *Whitworth v. Bynum,* 699 S.W.2d 194, 197 n.5 (Tex. 1985) (noting that the Equal Protection Clause of the Texas Constitution, TEX. CONST. art. I, § 3, is usually interpreted consistently with the United States Constitution). If Courts were blind to the capriciousness of certain legislative purposes, then the Equal Projection. clause would be empty. The United States Supreme Court, however, has recognized some, boundaries beyond which a state legislature' s purpose is no longer legitimate. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421,423 (1952). Specifically, a state purpose, is not legitimate if that purpose violates a constitutional provision or conflicts with federal law. *Id.*

Besides the. boundaries recognized by the United States Supreme Court, the legislature's purpose is illegitimate when that purpose violates a legislatively announced public policy. If a state could violateits own public policy, the Equal Protection Clause would be powerless to prevent a state from creating arbitrary distinctions in the law. *Olech*, 528 U.S. at 564; *Avery*, 390 U.S. at 484. For example, the

State of Texas could choose to save money by excepting the A&M and UT Systems from the Texas Whistleblower Act, TEX. GOV'T CODE § 554.001, et seq. If this were the case, if an employee of the A&M or UT Systems rported an illegal activity, the A&M and UT Systems could retaliate against a reporting employee by firing the employee, and the employee would have no remedy despite the Whistleblower Act's legislatively approved public policy of preventing Such retaliation because the Sovereign Immunity of the State of Texas would be pleaded to defeat every claim, just as was done in the case at bar. Clearly in this example, the state legislature's purpose would be arbitrary, even if the legislature's purpose did not contravene the constittution or a federal statute.

The Texas Whistleblower Act's goal in protecting reporting employees from retaliation is wholly analogous to the case at bar. As described in the example above, it is the retaliation for making a Whisfleblower report that is protected. Without this protection against retaliation an employee would likely be hesitant to make a Whistleblower report, and some reports would, of course, not be made at all. If our legislature dared to exempt A&M and UT System employees from the Texas Whistleblower Act's protections because it would save the State of Texas money, which it most certainly would, there would be a great outcry because there simply is no legitimate purpose for such a distinction between similarly situated employees. While money could and would be saved by failing to protect all such employees from this kind 0f retaliation, there is no rational support for such.an illegitimate distinction. The legislature's power to distinguish between similarly situated employees is not unbridled. Any effort by the legislature.to make distinction s between similarly situated employees must not only have a basis, but that

result must be a rational basis founded in a legitimate governmental purpose.

The Equal Protection Clause clearly imposes limits On the. "legitimate purposes" a state can claim to justify treating similarly situated employees differently. This Court can not give legitimacy to a legislative purpose that illegitimately violates a public policy that has been announced by the state legislature. In the case at bar, just like in the Whistleblower example above, without the protection against retaliation for filing a workers' compensation claim, claims will go unreported for fear the employee will lose his or her job. There-is no legitimate purpose behind a legislative attempt to deny protection to A&M and UT System employees from retaliation for filing for workers' compensation benefits.

Richards' Petition for Review invites this Court to render an opinion that imposes a meaningful limit on the legitimate state purposes which justify making distractions between smfilarly-situated state employees: Thus, Richards asks this Courtto exercise its jurisdiction to hear cases involving constitutional issues. TEX. R. APp. P. 56. l(a)(4). Unless this Court Seizes the opportumty to clarify its interpretation of the Equal Protection Clause of the United States and Texas Constitutions, the Texas Legislature will be emboldened to create more arbitrary and harmful distinctions based on illegitimate state purposes that Contravene legislatively announced public policy. Today, this Court can ensure that the legislature appreciates the true limits of its authority under the United States attd Texas Constitutions.

II. Does the Appellees' proffered legitimate state purpose of saving the state money violate public Policy, as declared by the Texas legislature, when the legislature's scheme eviscerates the Texas Workers Compensation Act with regard to employees of Texas A&M and the University of Texas Systems?

The Texas legislature has' given all public (except as noted below) and private employees a remedy when their employer retaliates against them for filing a workers' compensation claim. Chapters 501 to 505 of the Labor Code govern the waiver of sovereign immunity for state agencies regarding the Workers' Compensation Act. But the. legislature has denied that remedy to employees of the A&M and UT Systems. TEX: LABOR CODE §§ 502.001 - 502.070; §§ 503.001 - 5031071: Specifically, the legislature did not list Chapter 451, the anti-retaliation provisions, among the Act's provisions for which the state waives its Sovereign immunity as to the A&M and UT Systems. §§ 502.002, 503.002. To justify the legislature's distinction, the Court of Appeals found a single legitimate state purpose: to save the state money.[1] Tab-1. p. 12-13.

The fact remains that this state purpose, saving the state money, violates the public policy of Texas; as announced by the state legislature in the Texas Workers' Compensation Act. § 40i.001 *et. seq*. The Act's overarching purpose is to ensure that employees who are injured on the job receive Prompt remuncration. *Paradissis v. Royal*

[1]Curiously, the Court of AppealS doubted whether A&M fires its employees for filing workers' compensation claims. TAB 1. p. 13. But no one will never know that A&M retaliates against its employees, so long as Richards cannot go forward with his case!

Indemnity Co., 507 S.W.2d 526, 529 (Tex. 1974). In most cases, the Act is an injured employecs exclusive remedy for work-related injuries. §408.001(a). Given that an employee often has a remedy only under the Act, the legislature recognized that employers could escape workers' compensation liability by retaliating harshly against employees who filed workers' compensation claims, because workers wonld be discouraged from pursuing clams. *See Trico Technologies, Corp. v. Montiel*; 949 S.W.2d 308, 312 (Tex. 1997); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362; 367 (Tex. App.-El Paso 2002, no pet.). Thus, the legislature has declared that the anti-retaliation provisions of the Act are critical to supporting the public policy of providing injured workers with prompt remuneration.

Stripped of the Act's protections against retaliation, injured employees of the A&M and UT Systems are faced with the unchecked threat that their employer will retaliate against them for filing a workers' compensation claim. This fear of retaliation will create a *chilling effect*, as fewer and fewer injured workers take advantage of the prompt remuneration provided by workers' compensation. If one injured worker chooses to suffer with untreated and/or uncompensated injuries rather than risk losing his or her job for filing a claim, that is one worker too many. Because of the Court of Appeals' ruling, the A&M and UT Systems may, in effect, save the state some money because their injured employees will not want to risk filing workers' compensation claims and risk losing their jobs. The Texas Legislature's Scheme to deny injured employees at their flag ship institutions the protection against retaliation for filing Workers' compensation claims may be a money maker for our State; but the Cost of "saving" this money is too high and has no legitimate purpose.

The Court of Appeals has found that saving money is our legislature's sole rational basis for excluding A&M and UT. System employees from the anti-retaliation protection of the Workers' Compensation Act. But, in this limited Context, Richards contends that saving money is not a legitimate legislative purpose. The Equal Protection Clause can not be interpreted to allow A&M and UT System employees to be stripped of their right to be protected when filing workers' compensation claims, while all other private and public employees enjoy this protection. If the Court stands idly by today, and fails to recognize this complained of action as being an illegitimate purpose, what other arbitrary violations of public policy will the Court tolerate? It is not too far a stretch of the imagination to think that, in the example cited herein, the legislature might next abrogate the rights of A&M and UT System employees by taking away their right to be protected, from retaliation when making Whistleblower reports. A legislature's power to make such arbitrary distinctions between similarly situated employees is not unbridled. The Equal Protection Clause does not require that there be just "some basis" for a distinction between Similarly situated employees, but that the distinction is a,"rational basis" Supported by a legitimate purpose. The legislature has no legitimate purpose here because violating state policy, as created by the legislature, can never be a legitimate purpose to support such a distinction.

The Court of Appeals cites *Clark v. Univ. of Tex. Health Science Cir.*; 919 S.W.2d 185, 188 (Tex. App. - Eastland 1996, writ denied) in an effort to follow its Sister Court which upheld Chapter 503 from an Equal Protection challenge. Tab 1., p. 12: However, the Eastland Court's decision is bad law. While discussing the Equal Protection

Clause, the Eastland Court applied a Due Process analysis. Specifically, the Eastland Court held that Clark did not have a property interest. *Id.* at 188. However, lack of a property interest is relevant to a Procedural Due Process analysis, not an Equal Protection Clause analysis. *Am. Mfr. Mut. Ins. v. Sullivan*, 526 U.S. 40, 59(1999). The fact that a published Appellate Court decision misapplies the law in deciding this issue, underscores the need for the Supreme Court to speak on this point.

The truth of the matter is that the question before this Court is not academic endeavor-the rights of thousands of state employees in the A&M and UTSystems hang upon the Constitutional guarantees that this Court finds in the Equal Protection Clause. In short, this question is of such importance to the State's jurisprudence that it begs to be addressed.

Chapters 502 and 503 eviscerate theWorkers' Compensation Act as to employees of the A&M and UT Systems, and the only state interest that can be advanced in defense of these statutes is that they will save the state money. But this purpose violates the public policy announced in the Workers' Compensation Act which is to provide injured employees with prompt remuneration. *See Paradissis*, 507 S.W.2d at 529. In effect, the Court of Appeals has giventhe State a free hand to single out certain State employees to hire them, hurt them, and then summarily fire them when they seek the compensation for their injuries to which all other workers are entitled. Accordingly, this Court should refuse to recognize that Saving the state money alone is a legitimate state interest to deny workers in the A&M and UT Systems the protections given to all other workers in the State of Texas.

III. Do Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because the Appellees have failed to articulate a legitimate.state purpose?

Under the United States and Texas Constitutions, a state statute Survives rational basis scrutiny onlywhen the statute is rationally related:to a legitimate state purpose. *Bd of T'r. of the Univ. of Ala. v. Garrett*, 531 U.S: 356, 367 (2001); Whitworth, 699 S.W.2d at 197. Here, the Appellees have failed to articulate a legitimate state purpose, because saving the state money alone is not a legitimate purpose. Therefore, Chapter 502 and 503 of the Texas Labor Code violate the Equal Protection Clause ofthe United States and Texas Constitutions.

Thus, the Validity of these statutes is Squarely before this Court, Clearly, cases involving the validity of statutes are within this Court's jurisdiction. TEX. R. APP. P. 56.l:(a)(3). In light of this issue's importance to the rights of thousands of employees of the A&M and UT Systems,this Court should not hesitate to exercise its authority to review Richards' case.

IV. Do chapter 502 and 503 of the Texas Labor Code withstand strict scrutiny under the United States and Texas Constitution?

A. Was race a motivating factor to the Texas legislature in enacting Chapter 502 and 5103 when these statutes have a disparate impact on minorities?

In stark contrast to rational-basis review, courts give little deference to a legislature when a statute distinguishes between similarly-situated individuals based on race. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct, 2325, 2338 (2003). Even.though a statute does not make racial distinctions on its face, courts will apply strict scrutiny if racial discrimination was a motivating factor in the legislature's dccision-making. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 u.S. 252, 265-66 (1977). The United States Supreme Court has established a framework for determining whether racial discrimination was a motivating factor. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471,489 (1997). An important Starting point is whether the statute has a disproportionate impact on minorities. *Id.* Further, a court should consuler the historical background of the legislatures decision, the specific sequence of events leading up to the challenged decision, any departures from the normal procedural sequence, and the statute's legislative history. *Id.*

As described above, Chapter 502 and 503 effectively strip workers in the A&M and UT Systems of their rights to seek prompt remuneration for workplace injuries. For this reason alone, these statutes violate the Equal Protection Clause, but there is more. The legislature's decision to place this heavy burden On workers at the A&M and UT Systems was racially motivated. The statutes' effects and the circumstances surrounding their enactment lead to the conclusion that racial discrimination was a motivating factor to the Texas legislature that enacted these statutes.

The fact that Chapter 502 and 503, have a disparate impact on racial minorities is an "important starting point." *Reno*, 520 U.S. at 489. Racial minorities make up a dispro-

portionately large number of the less educated labor pool that feeds jobs requiring manual labor.[2] People who work in jobs that require manual labor, in turn, will more frequently suffer job related injuries. [3] Therefore, the Workers Compensation Act has its largest impact in compensating work related injuries as to jobs that require manual labor, which are more disproportionately held by racial minorities. In other words, racial minorities make up a disproportionate number of the group of workers who most need prompt remuneration for their injuries and ultimately rely on the Workers' Compensation System. But the legislature chose not to protect this specific group from retaliation under Chapter 451, effectively• stripping them of the fight to prompt remuneration, because to seek prompt remuneration would put their jobs in jeopardy, with no protection.

Moreover, the legislature chose to simply leave in place a discriminatory scheme of Workers' compensation benefits that had been m place for over twenty years. Since the enactment of the Act's antirretaliation provisions, workers at the A&M and UT Systems have been defiled the protection against retaliation that is critical to the Act's legislatively-announced public policy. In 1971, the legislature enacted the anti-retaliation provisions as Vernon's Civil

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[2]U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 383, 385(122nd ed. 2002)(discussing minorities in manual labor)

[3]*Id.* at 406, 408 (discussing higher injury rates and costs related to jobs requiring manual labor); Anne C. Case & Angus Deaton, Broken Down by Work and Sex: How Our Health Declines (July 2003) (on file with the National Bureau of Economic Research at http://papers.nber.orglpapers/W9821)

Statute, Article 8307c– later codified as Chapter 451. Before the legislature enacted Chapter 501 as the general compensation scheme for state employees, Article 8309g, § 15 covered most state employees. Like Chapter 501, Article 8309g allowed most state employees to sue the state under the Act's anti-retaliation provisions. The predecessors of Chapter 502 and 503, however, denied workers at the A&M and UT Systems the right to sue under the anti-retaliation provisions. Specifically. Article 8309b, § 7 applied to workers at the A&M System, while Article 8309d, § ;/applied to workers atthe LIT System. Thus, the legislature endorsed a legislative scheme that was rooted in historical discrimination, even though the scheme has a disparate impact on,racial minorities.

Accordingly, race was a motivating factor when the legislature enacted Chapter 502 and 503. *Reno*, 520 U.S. at 489. And these statutes violate the Equal Protection Clause of the United States and Texas Constitutions, unless they survive strict scrutiny. *Grutter*, 123 S. Ct. at 2338

B. Are Chapter: 502 and 503 narrowly tailored to further a compelling state iterest?

Chapter 502 and 503 distinguish between similarly-situated individuals based on race, so strict scrutiny applies. Thus, these Statutes are Constitutional only if they are narrowly tailored to further a compelling governmental intetest. *Id.* at 2337-38. As the statutes cannot even survive rational-basis scrutiny, they cannot satisfy strict scrutiny.

The State has failed to articulate a rational basis for these statutes, much less a Compelling governmental interest. In fact, the State's only asserted interest to justify these

discriminatory statutes is to save the state money. A state interest is compelling only if the State show's that: (1) the State actually enacted the statute based on the interest; and (2) a strong evidentiary basis supports the interest. *Shaw v. Hunt,* 517 U.S. 899, 908 n.4 (1996). Here, the State has produced no evidence to show that saving the state money is a compelling state interest. In fact the State of Texas never even proffered this reason at the trial: Court or before the Appellate court. Instead, it was clear that the legislature did not rely on thus justification when enacting Chapter 502 and 503, because the Court of Appeals invented this reason to support the statutes. Tab 1, p. 12-13. Also, there is no indication of an unbearable financial strain on the State's treasury. Finally, as the sole analysis saving the state money alone has never been recognized as a compelling governmental interest.

Besides lacking a compelling governmental interest, Chapter 502 and 503 are not narrowly tailored. To be narrowly tailored, the State's means must be specifically and narrowly tailored to accomplish the compelling governmental purpose. *Grutter*, 123 S. Ct. at 2341. Of course, depriving A&M and UT System workers the fight to stie for retaliation will save money as to retaliation claims, as the State argues. But the effects of Chapter 502 and 503 are not limited to retaliation claims. As described above, these statutes create a chilling effect, thus discouraging injured workers at the A&M and UT Systems from even filing workers' compensation claims at all: Where the State intended to save money as to retaliation claims, the State has also created a ruse that saves the state moneyas to all workers' compensation claims by A&M and UT System workers. Thus, Chapter 502 and 503 are not narrowly tailored, rather their effects are

sweeping and far reaching.

Because Chapter 502 and 503 fail strict scrutiny, they violate the Equal Protection Clause of the United States and Texas Constitutions.

PRAYER

Michael Richards respectfully requests that this Court reverse the Tenth Court of Appeals' panel decision issued on February 11, 2004. Specifically, Richards requests that this Court reverse the Trial Court and fmd that Chapter 502 and 503 of the. Labor Code violate the Equal Protection Clause of the United States and Texas Constitutions because they fail to provide protection against retaliation for filing a workers' compensation claim, a protection granted all other State employees. Richards further asks that sovereign immunity be abrogated as to his claims and that his case be remanded to the trial court with instructions for further proceedings that are consistent with this Court's opinion.

Respectfully submitted,
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GENTRY & RIFE, P.C.
By: /s/ Gaines West

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ATTORNEY FOR PETITIONER

CERTIFICATE.OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been sent by overnight delivery to the following on this the 23rd day of April, 2004.

Brad McClellan
ASSISTANT ATTORNEY GENERAL
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Austin, Texas 78711-2548

/s/ Gaines West
Gaines West

APPENDIX I

THE SUPREME COURT OF TEXAS
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Austin, Texas 78711

(512) 463-1312

June 25, 2004

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RE: Case Number: 04-0387
Court of Appeals Number:
10-01-00183-CV
Trial Court Number: 47,822-361

Style: MICHAEL RICHARDS
V.
TEXAS A&M UNIVERSITY SYSTEM AND
TEXAS A&M UNIVERSITY

Dear Counsel:

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

Sincerely,
/s/ Andrew Weber
Andrew Weber, Clerk
by Claudia Jenks,
Chief Deputy Clerk

co: MS. Sharri Roessler
Mr. Jerry Deere

APPENDIX J

V.T.C.A., Labor Code § 502.002

C
VERNON'S TEXAS STATUTES AND CODES ANNOTATED
Vernon's Texas Statutes and Codes Annotated
Currentness
LABOR CODE
Labor Code (Refs & Annos)
TITLE 5. WORKERS' COMPENSATION
Title 5. Workers' Compensation
SUBTITLE C. WORKERS' COMPENSATION INSURANCE COVERAGE FOR CERTAIN GOVERNMENT EMPLOYEES
Subtitle C. Workers' Compensation Insurance Coverage for Certain Government Employees
CHAPTER 502. WORKERS' COMPENSATION INSURANCE COVERAGE FOR EMPLOYEES OF THE TEXAS A&M UNIVERSITY SYSTEM
Chapter 502. Workers' Compensation Insurance Coverage for Employees of the Texas a&M University System
SUBCHAPTER A. GENERAL PROVISIONS
Subchapter A. General Provisions
→§ 502.002. Application of General Workers' Compensation Laws; Limit on Actions and Damages

(a) The following provisions of Subtitle A apply to and are included in this chapter except to the extent that they are inconsistent with this chapter:

(1) Chapter 401, other than Section 401.012 defining "employee";
(2) Chapter 402;
(3) Chapter 403, other than Sections 403.001-403.005;
(4) Chapter 405;
(5) Sections 406.031-406.033; Subehapter D, Chapter 406; [FN1] Sections 406.092 and 406.093;
(6) Chapter 408, other then Sections 408.001(b) and (c);
(7) Chapters 409 and 410;
(8) Subchapters A and G, Chapter 411, [FN2] other than Sections 411.003 and 411.004; and
(9) Chapters 412-417.

(b) For the purpose of applying the provisions listed by Subsection (a) to this chapter, "employer" means "the V.T.C.A., Labor Code § 502.002 institution."

(c) Neither this chapter nor Subtitle A authorizes a cause of action or damages against the system or arty institution or employee of the system or institution beyond the actions and damages authorized by Chapter 101, Civil Practice and Remedies Code.

CREDIT(S)
Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

[FNI] V.T.C.A., Labor Code § 406.07l et seq.

[FN2] V.T.C.A., Labor Code § 411.001 et seq., and § 411.091 et seq.

V. T. C. A., Labor Code § 502.002, **TX LABOR § 502.002**
END OF DOCUMENT

APPENDIX K

V.T.C.A., Labor Code § 502.002

C
VERNON'S TEXAS STATUTES AND CODES ANNOTATED
Vernon's Texas Statutes and Codes Annotated
Currentness
LABOR CODE
Labor Code (Refs & Annos)
TITLE 5. WORKERS' COMPENSATION
Title 5. Workers' Compensation
SUBTITLE C. WORKERS' COMPENSATION INSURANCE COVERAGE FOR CERTAIN GOVERNMENT EMPLOYEES
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(5) Sections 406.031-406.033; Subehapter D, Chapter 406; [FN1] Sections 406.092 and 406.093;
(6) Chapter 408, other then Sections 408.001(b) and (c);
(7) Chapters 409 and 410;
(8) Subchapters A and G, Chapter 411, [FN2] other than Sections 411.003 and 411.004; and
(9) Chapters 412-417.

(b) For the purpose of applying the provisions listed by Subsection (a) to this chapter, "employer" means "the V.T.C.A., Labor Code § 502.002 institution."

(c) Neither this chapter nor Subtitle A authorizes a cause of action or damages against the system or arty institution or employee of the system or institution beyond the actions and damages authorized by Chapter 101, Civil Practice and Remedies Code.

CREDIT(S)
Acts 1993, 73rd Leg., ch. 269, § 1, eff. Sept. 1, 1993.

[FNI] V.T.C.A., Labor Code § 406.071 et seq.

[FN2] V.T.C.A., Labor Code § 411.001 et seq., and § 411.091 et seq.

V. T. C. A., Labor Code § 503.002, **TX LABOR § 503.002**
END OF DOCUMENT